No. [illegible]

The Public Utilities Commission of the State of Kansas et al., Appellants,

vs.

John M. Landon, as Receiver of The Kansas Natural Gas Company, et al.

Filed [illegible]

No. [illegible]

Kansas City, Missouri; The Public Service Commission of the State of Missouri, et al., Appellants,

vs.

John M. Landon, as Receiver of The Kansas Natural Gas Company, et al.

Filed January 14, [illegible]

No. [illegible]

Kansas City Gas Company, The Wyandotte County Gas Company et al., Appellants,

vs.

Kansas Natural Gas Company, John M. Landon and George F. Sharritt, Receivers, and Fidelity Title and Trust Company.

Filed January 14, [illegible]

No. [illegible]

The Public Utilities Commission of the State of Kansas et al., Appellants,

vs.

John M. Landon, as Receiver of The Kansas Natural Gas Company, et al.

Filed [illegible]

Appeals from the District Court of the United States for the District of Kansas.

SUPPLEMENTAL BRIEF

[illegible]

Clifford [illegible] Smith,
Solicitor for Fidelity Title & Trust Company, Appellee.
R. A. Brown,
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Solicitors for John M. Landon, [illegible] Receiver of Kansas Natural Gas Company, Appellee.
John J. Jones,
Solicitor for George F. Sharritt, Receiver of Kansas Natural Gas Company, Appellee.

[illegible]

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Supreme Court of the United States

October Term, 1918.

No. 277.

THE PUBLIC UTILITIES COMMISSION FOR THE STATE OF KANSAS ET AL.,
Appellants,

vs.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS COMPANY, ET AL.

Filed September 20, 1917.

No. 329.

KANSAS CITY, MISSOURI; THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ET AL., *Appellants,*

vs.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS COMPANY, ET AL.

Filed January 10, 1918.

No. 330.

KANSAS CITY GAS COMPANY, THE WYANDOTTE COUNTY GAS COMPANY, ET AL., *Appellants,*

vs.

KANSAS NATURAL GAS COMPANY, JOHN M. LANDON AND GEORGE F. SHARITT, RECEIVERS, AND FIDELITY TITLE AND TRUST COMPANY.

Filed January 14, 1918.

No. 353.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS ET AL.,
Appellants,

vs.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS COMPANY, ET AL.

Filed February 6, 1918.

Appeals from the District Court of the United States for the District of Kansas.

SUPPLEMENTAL BRIEF

ON BEHALF OF JOHN M. LANDON, MANAGING RECEIVER OF KANSAS NATURAL GAS COMPANY, FIDELITY TITLE & TRUST COMPANY, KANSAS NATURAL GAS COMPANY, AND GEORGE F. SHARITT, RECEIVER OF KANSAS NATURAL GAS COMPANY, APPELLEES, IN ANSWER TO BRIEFS OF APPELLANTS.

STATEMENT.

Owing to the late date at which appellants filed their brief, the number of appellants and the range of the law points involved, appellees were obliged

to prepare their brief on the main questions without seeing opposing counsels' brief.

As the different appellants have presented various and diversified arguments in their briefs, the appellees have felt it necessary to present a supplemental brief answering the more important arguments in appellants' briefs, some of which are not covered by our first brief.

THE ORDER OF THE PUBLIC UTILITIES COMMISSION OF KANSAS OF DECEMBER, 1915, FIXES RATES THAT ARE UNJUST, UNREASONABLE, NON-COMPENSATORY, CONFISCATORY, AND TAKE THE PROPERTY IN PLAINTIFF'S POSSESSION WITHOUT DUE PROCESS OF LAW.

In view of the convincing and indisputable evidence submitted to the trial court and the statement of evidence prepared by the appellants themselves we did not anticipate any serious argument against this proposition. However, the brief of the Kansas Commission and the brief of the Kansas City Gas Company raise the issue.

Mr. Dana for the Kansas City Gas Company says (Brief 101-102): "The fatal weakness of the plaintiff's case remains, to-wit, that he has offered no evidence showing either the operating costs or the reasonable value of the local companies used and useful in the joint service of furnishing natural gas to the public."

There are at least two answers to this statement. The first is that such evidence was offered and the second is that the rate enjoined was so low that the valuation of the distributing companies became immaterial. The first we will discuss now; the second will appear from our later discussion of the rate itself.

This suit is not one to fix a rate, but to enjoin a rate fixed by a commission. To fix a rate would involve a careful valuation of all property used and useful and a determination of the reasonable cost of operation, etc., but to enjoin a rate, if it be shown that the rate will not yield more than the

cost of operation, the valuation of the property becomes unnecessary.

In this case the Kansas Commission fixed a 28c rate to the ultimate consumer, out of which in Kansas the receiver got 62½% and the distributing company got 37½%, while on the balance of the system the receiver got 66 2/3% and the distributing companies got 33 1/3%. The inquiry is not whether the 28c rate is confiscatory as to the distributing companies, but only as to the receiver.

The rate being to the ultimate consumer includes compensation for service to the distributing company, as well as by the receiver. The distributing companies are the agents of the receiver and as pay for the services receive a percentage of the amount collected from the consumer. The gas belongs to the receiver until delivered to the consumer.

(a) Valuation of distributing plants and experience under 28c rate.

There was not made a scientific valuation of all of the distributing plants. Several of the larger plants, however, were valued by expert engineers and their evidence was introduced. Among these were the distributing plants at Topeka, Atchison and Leavenworth, and we are astounded at Mr. Dana's statement that no evidence was introduced either as to the valuation or operating revenue and expenses of the distributing plants in view of the fact that Mr. Brundrett, the president of the Kansas City Gas Company and of the Wyandotte

County Gas Company was on the stand and testified that both those companies were operating at a loss, the Kansas City Gas Company under 37½% of a 30c rate and the Wyandotte County Gas Company under 37½% of a 28c rate. Where the distributing companies operated at a loss the valuation of the plants, of course, became immaterial.

We are still more astounded at Mr. Dana's statement that the plaintiff "has offered no evidence showing either the operating cost or the reasonable value of the local companies, used and useful in the joint service to furnish natural gas to the public," because in the statement of the evidence prepared and filed by the appellants themselves, beginning on page 1103 of the record, there is a statement that the 28c rate was a joint rate to the ultimate consumer, covering compensation to the receiver and the distributing companies, on the same division provided for in the supply contracts, which contracts, however, never had been adopted by the receiver. That at the hearing before the Utilities Commission it was assumed that the same division would be followed. That this same assumption was made at the hearing before the enlarged court, but that on the final hearing the ratio division was brought into question and that the question then arose as to whether the receiver might realize a larger percentage of the 28c rate. The statement then continues as follows:

> "In the absence of an assumption that two-thirds was all that could be obtained, evidence was required as a basis for a finding with regard to the matter. *Accordingly, considerable*

evidence was introduced touching the financial status of the various distributing companies, the valuation of their plants, the character and extent of their business, their operating expenses and other allied matters. This evidence was introduced, not for the purpose of ascertaining with accuracy what would be a just and fair rate to be charged by the various distributing companies, but solely for the purpose of ascertaining whether there was any reasonable grounds for holding that the receiver could obtain more than two-thirds of the 28-cent joint rate. This evidence was taken and the inquiry made on the basis of laying aside temporarily the contracts between the Kansas Natural Gas Company and the distributing company, and without undertaking to pass upon the validity of those contracts as between the original parties." (R., p. 1104.)

The evidence thus epitomized was incorporated in Judge Booth's opinion and findings. (R., pp. 577-8.)

Mr. Dana certainly is mistaken in saying that there is a fatal weakness in plaintiff's proof and that no evidence was offered showing either the operating costs or the reasonable value of the local companies. There was absolutely no evidence offered to the contrary, and Judge Booth's finding therefore cannot be questioned.

(b) Recent admissions by appellants, Wyandotte County Gas Company and Kansas City Gas Company as to inadequacy of rates.

Moreover, as disclosed by the motion to dismiss filed herein, the Kansas City Gas Company, Mr.

Dana's client, has recently filed its application, verified by the same Mr. Brundrett, signed by Mr. Dana as solicitor, before Judge Booth, alleging that under a 60-cent rate, of which it receives 42½ per cent, which has been in force for ten months, it has sustained a loss of $492,417.73, which for a year would be at least $600,000. It also states that the reasonable present value of its property is $8,500,000 at normal prices.

A similar application for the Wyandotte Company alleges a loss of $106,665 in ten months, under the 60-cent rate, equal to an annual loss of $125,000.

Counsel's statement in his brief is beyond our understanding.

So much for valuation of the distributing plants—or rather, the question of whether or not the receiver could be reasonably expected to realize more than two-thirds of the 28-cent rate. He could not.

(c) The receiver's portion of 28c rate is confiscatory.

Is the 28-cent rate, of which the receiver realizes two-thirds, an unreasonable or confiscatory rate as to him?

The trial court and the three judges did not decide that the method adopted by the Kansas Commission was correct, but for the sake of the argument adopted the theory of the Commission and separated the production end of the receiver's business from the transportation end, and on that basis found the rate to be confiscatory. Again they did not find that the Commission's valuation

was correct, but for the sake of the argument assumed it to be correct, and on that basis found the rate to be confiscatory.

If the findings of the three judges and of the trial court as to the adequacy of the 28-cent rate are to be questioned, it is only fair to those judges, as well as to the plaintiff, that the starting point shall be the evidence introduced and not a point of advantage conceded to the defendant purely as a matter of argument.

A summary of the history of the Kansas Natural Gas Company is given by Judge Booth in his opinion in this case and found on page 564 of the printed record. We do not reprint it here, but ask the court to read it carefully.

(d) The receding gas fields require costly extensions each year without increasing capacity of plant.

When organized in 1903 the Kansas Natural got its supply of gas in Wilson county, Kansas, only 127 miles from Kansas City, its principal market; today its supply comes from near Tulsa, Oklahoma, more than 250 miles from Kansas City. Gas fields once thought to be inexhaustible have been rapidly depleted. Each year has demanded a search for and extensions to new fields. As a part of Wyer's affidavit (R., p. 1116, l. c. 1142) there are maps and charts which show the rapid decline in rock pressure, the lengthening pipe lines and the endless search for new pools of gas. There is no regeneration in gas wells. (R., p. 1123.) Once depleted, the pool is gone. The life of the best pool is scarcely three years. The cost

of extensions to new pools is very great, involving the purchase and laying of gathering lines from the wells, and large main or trunk lines, all under ground, the building of large compressor or pumping stations, and frequently of smaller or booster stations in the fields. Much of the cost of these extensions is the cost of labor, and when the pool is exhausted all that portion of the expense is lost unless, perchance, the next extension is on beyond in that same direction. The added investment to reach new pools does not increase the capacity of the plant, as in other utilities, but does well if it maintains the former efficiency.

All available pools now in use will probably be exhausted within six years (from 1916). (R., p. 1135.)

The invested capital, therefore, is constantly increasing and large amounts must every year be charged off for depreciation because of depleted fields, or else the extensions to new fields must be charged to operating expenses. It makes little difference which is done if the depreciation be equal to the difference between the cost of the extension and the salvage when the pipe and equipment are taken up.

(e) Valuation of the receiver's property.

The Commission found that the total value of the company's property as of January 1, 1915, was $8,994,811.03. (Rec., p. 58.) This is exactly the amount found by the engineer of the Commission, and his testimony shows that he allowed nothing

whatever for the cost of attaching the business or for what is known as "going value." In other words, this valuation of $8,994,811.03 is the value of the physical plant plus overhead charges during construction, including engineering, taxes and interest during construction. The Commission's engineer arrived at this amount by ascertaining the reproduction cost new less accrued depreciation and adding overhead charges during construction only. No valuation of a lower figure was presented to the Commission in any of the hearings, and there is no evidence on which a lower valuation can be based by the Commission than that of its engineer. The Commission in its opinion asserts that it took into consideration in fixing this valuation the fact that the property was a going business. It says (Rec., p. 57):

> "That the plant, with the business attached, is worth much more than it would be without such business connections, may be freely conceded. Without its existing business, its distributing contracts, its customers, its established sources of supply, it would constitute, practically, only an accumulation of junk. The present value of the plant has been ascertained and determined as an entirety, taking into consideration the fact that it is a going concern in actual and successful opertion. In fixing this value we have taken into account the fact that the plant is in operation, with more customers than it can properly serve."

This argument has already been passed upon by the Court of Appeals of New York in the case of

People v. *Willcox,* 104 N. E. 911, 51 L. R. A. n. s. 1, where Mr. Justice Miller said:

> "Thus, the first question certified requires us to decide whether going value is to be appraised as a distinct item, or whether it is sufficient to regard it as something vague and indefinable to be given some consideration, but not enough to be estimated. The valuation of the physical property was determined by ascertaining the cost of reproduction less accrued depreciation. Preliminary and development expenses prior to operation were included, but no allowance was made for the cost of developing the business. By that method the plant was valued in a sense as a 'going concern.' In other words, 'scrap' values were not taken; but to say that that sufficiently allows for going value is the same as to say that going value is not to be taken into account. The problem is to determine what is fair to the public and the company. The public is entitled to be served at reasonable rates, and the company is entitled to a fair return on its investment, on the value of the property used by it in the public service. * * * It would have been entitled to a return on the valuation adopted by the commission, if it had no customers, but was just ready to begin business, whereas it had a plant in operation with an established business, which everyone knows takes time, labor and money to build up."
>
> * * * * * * *
>
> "If going value is capable of ascertainment, it will not do for the Commission vaguely to consider it in fixing the fair rate of return. * * * The difficulty of determining the going value will not justify the disregarding of it.

Rate making is difficult, but that will not justify confiscation."

*   *   *   *   *   *   *

"I define 'going value' for rate purposes as involved in this case, to be the amount equal to the deficiency of net earnings below a fair return on the actual investment, due solely to the time and expenditures reasonably necessary and proper to the development of the business and property to its present stage, and not comprised in the valuation of the physical property.

*   *   *   *   *   *   *

"It remains to consider how going value is to be appraised.

*   *   *   *   *   *   *   *

"Obviously, the most satisfactory method is to show the actual experience of the company, the original investment, its earnings from the start, the time actually required and expenses incurred in building up the business, all expenditures not reflected by the present condition of the physical property, the extent to which bad management or other causes prevented or depleted earnings, and any other facts bearing on the question, keeping in mind that the ultimate fact to be determined is not the amount of the expenditures, but the deficiency in the fair return to the investors due to the causes under consideration."

This Court, in the case of *Des Moines Gas Company* v. *Des Moines,* 238 U. S. 153, 35 Sup. Ct. Rep. 812, has stated the matter in this way:

"'Going value,' or 'going concern value,' i. e., the value which inheres in a plant where its business is established, as distinguished

from one which has yet to establish its business, has been the subject of much discussion in rate-making cases before the courts and commissions. Many of those cases are collected in Whitten on 'Valuation of Public Service Corporations,' Secs. 550-569, and the supplement to the same work, Secs. 1350-1385. That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned, although dedicated to public use. Each case must be controlled by its own circumstances, and the actual question here is: In view of the facts found, and the method of valuation used by him, did the master sufficiently include this element in determining the value of the property of this company for rate-making purposes?

"Included in going value as usually reckoned is the investment necessary to organizing and establishing the business which is not embraced in the value of its actual physical property."

The item of "going concern value" has been recognized by the Supreme Court of Kansas in the case of *Water Company* v. *Galena*, 74 Kan. 644, where it stated:

"We think the District Court erred in excluding from its estimate of the 'fair and equitable' value of the waterworks system the sum of $15,214.73, that being the amount found by the referee to be the value of the

plant as a going concern, including the franchise. A system of waterworks in a city, without the right to operate there, or without being connected with water takers, and not in running condition, would be comparatively worthless. The water company was the owner of these important elements of value, and it seems reasonable that they should not be taken without compensation."

In the case of *National Waterworks Company* v. *Kansas City*, 62 Fed. 853, 10 C. C. A. 653, an elaborate and exhaustive opinion was delivered by Mr. Justice Brewer, in which these question were clearly and fully discussed. He said:

"The original cost of the construction cannot control, for 'original cost' and 'present value' are not equivalent terms. Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is today. A completed system of waterworks, such as the company has, without a single connection between the pipes and the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many

buildings in the city—not only with a capacity to earn, but actually earning—makes it true that the 'fair and equitable value' is something in excess of the cost of reproduction. The fact that the company does not own connections between the pipes in the streets and the buildings—such connections being the property of the individual property owners—does not militate against the proposition last stated, for who would care to buy, or at least give a large price for, a waterworks system without a single connection between the pipes in the streets and the buildings adjacent? Such a system would be a dead structure, rather than a living and going business. The additional value created by the fact of many connections with buildings, with actual supply and actual earnings, is not represented by the mere cost of making such connections. Such connections are not compulsory, but depend upon the will of the property owners, and are secured only by the efforts on the part of the owners of the waterworks, and inducements held out therefor. The city, by this purchase, steps into possession of a waterworks plant—not merely a completed system for bringing water to the city and distributing it through pipes placed in the streets, but a system already earning a large income by virtue of having secured connections between the pipes in the streets and a multitude of private buildings. It steps into possession of a property which not only has the ability to earn, but is in fact earning. It should pay therefor not merely the value of the system which might be made to earn, but that of a system which does earn."

A similar decision was reached in the case of *Public Service Gas Company* v. *Board of Public Utilities Commissioners,* 87 Atl. 651, 84 N. J. L. 476, 95 Atl. 127, 92 Atl. 606, 94 Atl. 634.

The engineer of the Public Utilities Commission testified that he had fixed the value at $8,994,-811.03 by ascertaining the reproduction cost, less depreciation, and adding overhead charges during construction, including engineering, taxes and interest during construction; that he had allowed nothing for cost of attaching the business or for going value or going concern value. In other words, his valuation was a completed plant ready to do business, unattached and without customers, and this was the valuation the Commission adopted. The statement of the Commission above quoted might indicate that when it allowed a valuation as a complete plant, and not as an accumulation of junk, it had allowed all elements of value. As we have seen, this is erroneous.

The affidavit of Mr. Samuel S. Wyer filed in this case (Rec., pp. 1088, 1141) shows the "going value" or worth of connected consumers to be $2,000,000.00. The failure to include this item alone shows that the 28 cent rate is not compensatory.

But the Public Utilities Commission of Kansas did not allow a return on the $8,994,811.03 which it found to be the total valuation of the company's property, but deducted from this the value of all property possessed by the plaintiff and used in the production of gas. (Rec., p. 58.) The Com-

mission made a total deduction of $1,911,205.39 from the total valuation. We submit that as this property is used in the production of natural gas, and does produce natural gas, that the plaintiff should be allowed a return thereon.

(f) Separation between transportation and production.

The Kansas Commission has bitterly assailed the managers of the properties of the Kansas Natural because they failed to acquire a large acreage of gas producing property and has charged that because of this failure the Kansas Natural is not capable of rendering public service and its property is thereby subject to confiscation. The Wichita Natural, with a large acreage back of its transportation system, has been pointed out as the ideal gas utility.

The Commission recognizes the need of a large gas producing reserve, and, in the opinion accompanying the order attacked, we find, in that portion devoted to scolding the courts and attorneys, the following paragraph:

> "In the meantime, while the receivers were engaged in this litigation and wasting the revenues of the company, its leaseholds were exhausted, and they neglected to make proper effort to obtain an additional supply of gas necessary to meet the demands of the company's markets. Leases that were available for them were obtained by other companies operating in the same field. Now these receivers find themselves with an insufficient quantity of gas to supply the demands of their

> lines. They have large facilities for marketing gas, but not a sufficient supply of gas." (Rec., p. 80.)

The plaintiff concedes, as did every witness who testified, the great desirability of a gas transporting company owning large producing properties. The managers of the Kansas Natural realized this years ago. The evidence shows that a great transporting company, with a large body of gas producing property, should hold such production in reserve, conserving its own supply to meet the extraordinary demands of the winter days or to defend itself against exorbitant prices charged by sellers of gas in the field. Such producing properties are insurance against extortion by sellers of gas who otherwise might take advantage of the extremities of a transporting company without production and demand exorbitant prices for their gas. Such producing properties are a buffer to resist the shock of the extraordinary demands of the peak-load days. The greatest service to which such production property may be put is to hold it in reserve. This is the evidence, and this is the fact.

Such production properties have great value, and such value is properly dedicated to the public use. In fact, the attorneys for the Commission have said that without such producing properties a transporting company cannot render a service which is necessary to protect its transporting properties from confiscation. *Yet by its scheme of separation it refuses to allow a return upon the*

value of such producing property. It asks this Court to compel the plaintiff to own such property and hold it in reserve and to take his return in the purchase price of gas used from such production property. *The great value of production property is not in using the gas therefrom any faster than necessary, but in conserving it.* But conserving it would deprive the plaintiff of revenue from it; for in the defendant's plan he gets no revenue from conservation. *His revenue comes only when the reserves are drawn upon, resulting in a policy of paying a premium on waste and levying a penalty on conservation.*

If it is to the public good that a transporting gas company should have back of it a large amount of productive property; that this productive property should be conserved for use against the winter demands and as a weapon of defense against extortion, then such production property is properly dedicated to the public use and the plaintiff is entitled to a return upon its value and cannot be relegated to the principle that the only return is the market price of gas actually used.

(g) Ex post facto amortization.

The Commission's engineer finds that the value of the leaseholds and wells of the plaintiff is $1,911,205.39. (Rec., p. 58.) We wish to comment on this valuation later, but sufficient it is here to say that this item is absolutely disregarded in all of the figures compiled by defendant. It disregards this acknowledged item of value for two reasons:

First. It says that it is production property and cannot be used or useful for a public purpose. This point we have treated.

Second. It says the original investment in these leases was $4,113,563.46. It will be observed that this item is simply cash invested by the company in leases and wells after its organization and disregards the original properties embarked in the enterprise. The valuation is found in the Commission's opinion (Rec., p. 61) and is referred to in defendant's brief in these words:

> "That the Kansas Natural thereafter (i. e., after the organization) acquired other leases, all of which said leases cost the Kansas Natural Gas Company not to exceed $4,100,000, and said sum included the value of all materials used in the wells."

Then its accountant argues that this cash expenditure has been amortized in the past ten years and should be therefore disregarded in fixing a rate today. This argument is unsound for two reasons:

1. The inquiry is as to the value of the property at the time the rate is fixed or the decision thereon rendered. *If value is there at that time, a rate must be allowed on that value.* It cannot be disregarded because at some time in the past, before the rate-making power existed, it has been profitable enough to pay for itself. In the table used by the Commission this cash investment is amortized by crediting it with 11.70 per cent depletion item over the period from July 1, 1905, to

December 31, 1914. The argument is this: during that ten-year period these leases earned enough to pay for themselves. Therefore they are not properly entitled to a return now. Whatever value there is to them, defendant argues, is "velvet." "The plaintiff has eaten its cake and has it

The Utilities Law was passed in 1911. At that time a successful telephone plant had been in operation ten years, and had earned enough during that time to amortize itself. It therefore does not own the property, and the public is entitled to its use without return. Before the passage of the law the plant belonged to the owners and was worth a million dollars. After the passage of the law it belonged to the public and the owner has no interest in it. This is precisely defendant's argument. *Because these leases made money before the passage of the law and the fixing of the rate, their present value cannot be considered in fixing a rate, but will be appropriated by the public.* The law, it argues, reaches back seven years before its passage, determines a fair rate during those seven years and appropriates the balance to public use. Of course, its figures are erroneous, but even if correct, it is met with the unanswerable argument that the law gave it the right to fix rates in the future and not in the past, and gave the Commission no power to appropriate to the public profits earned before the passage of the law.

This fallacy is firmly embedded in the order of the Commission and the minds of its attorneys. They argue that we should consider the history of the plant from 1905 in arriving at this rate,

stretching the arm of the law, at the time of its enactment, six years into the past. When a law is passed it must act on the situation as it exists; it cannot correct evils of the past; the past must bury its dead.

2. The only theory by which defendants may appropriate these past profits, and may amortize the cash value of the leases by allowing a fair return upon them, is on the theory that they were dedicated to the public use. In other words, if the law had been passed in 1904, and the Commission had acted in 1904, their appropriation of these leases by allowing a fair return upon them is upon the theory that they are used in a public purpose. But the Commission is proceeding upon the theory that productive property cannot be dedicated to a public use, and therefore separate it as production property and allow no return upon it. If this is good law for the future it is good law for the past. But perhaps there is a reason:

The facts show that the company sold, during this ten-year period, $30,629,066.07 worth of gas. They bought, during the same period, $3,438,-596.90 worth of gas. (Rec., p. 65.) From these leases of the company, then, there was derived a gross revenue of over twenty-seven million dollars in the ten years. The net revenue was over eighteen million. (Commission's table, Rec., p. 65.) At the present time the leases are not producing as much gas as they have in the past. Moreover, conservation has taken the place of wastage. The company is conserving its own production. Therefore, the Commission says, when your leases were producing largely, we will con-

sider them dedicated to the public use and appropriate the profits by allowing a 6 per cent return on the cash investment. When they commence to run down, and it is policy to conserve them, we will no longer consider them public property, but compel you to hold them as private property, allow you no return thereon except the wholesale price of the gas which you may use from them in emergency. When the leases actually earn more than 6 per cent we will consider them public property; when they fall below that by reason of a sound policy of conservation, we will consider them private property.

(h) Original investment disregarded.

For the double purpose of showing that there is no going value to the plant, and to justify the appropriation of something over four million dollars actually expended in production property, the Commission has compiled a table (Rec., p. 67) showing that the company earned 11.32 per cent during its existence. This was interesting news to the stockholders and managers of the property, who received no such return. The Commission would have placed the stockholders under lasting obligation if it had gone ahead and pointed out where this large return had vanished. It is undisputed that it never reached the owners of the property. One or two serious errors will be sufficient to show that the entire table should be disregarded and fact substituted for fiction.

1. This table (Rec., p. 67) figures a return upon an annual investment of $9,270,900.50. In arriv-

ing at this figure the only values ever credited to the company, outside of its transportation system, is the item of $4,113,563.46, which we have seen was actually expended after the organization of the company on production property, and this was treated as having been amortized.

The original value of the leases turned over is not of particular interest in figuring a rate today. But it becomes a vital factor in determining whether the company has made money in the past. Were the properties turned to the company in return for the original twelve million of stock of any value during the first ten years of the company's operation? Should they be considered in arriving at the question of whether the company made money during the same period? The Commission says not. Let us examine:

(a) During that ten-year period these leases, together with those afterward purchased, produced gas which was sold for over twenty-seven million dollars, excluding leakage. The net return after deducting operating expense was over eighteen million.

(b) At the time the company was organized the following property was exchanged for stock:

> 95,000 acres of leases on which there were 67 gas wells with a production of 400,000,000 cubic feet per day; and 24 oil wells producing $10,000 worth of oil per month.
>
> 1,264 acres of land in fee.
>
> Pipe lines, franchises, tanks, derricks, engines, pumps, horses, wagons and tools.

This property was subject to an incumbrance of $550,000, and an expenditure for development of about $350,000, which the Kansas Natural assumed.

In addition, the following:

> 90,000 acres of leases, with 38 producing wells, fully equipped. This was clear. (Rec., p. 1075.)

(c) After full investigation Judge Flannelly found these leases and property to be worth, at that time, $8,000,000. (Bill, p. 182.) There was other evidence to the same effect.

They are alleged in the verified bill which was offered in evidence to have had a value of at least $60,000,000 at the time the company was organized. (Rec., p. 25.)

Was there value there during the ten-year period? We say there was. If there was, then a table which ignores that value figures a fictitious profit that never existed in fact, and is not a safe guide.

The error in the separation of the production from the transportation runs through every compilation of the Commission. To correct its tables, with such an error present, presents the difficulty attendant upon the unscrambling of eggs.

The other errors may be eliminated by simply adding to the necessary needs of the plaintiff an amount to compensate such errors.

If we have been correct in our argument upon these points, it was the duty of the Commission

to take into consideration the present value of the leases and wells—the production property—of the plaintiff. This value is estimated by the Commission's engineer at $1,911,205.39. (Rec., p. 58.) This is a very low estimate. Mr. Wyer's estimate is over two million. If it is two million dollars, this error alone would figure as follows:

8% interest as a fair return.....	$160,000.00
Amortize in six years..........	333,333.00
	$493,333.00

From this item should be deducted the allowance made by the Commission for gas purchased at 4 cents a thousand feet. From the various exhibits it has appeared in evidence that the estimated production for 1916 (which was in excess of the year preceding) was about seven billion cubic feet, which at 4 cents a thousand amounts to $280,000. Subtracting this, leaves a net loss to the plaintiff by reason of this error of $213,333.00 or about two and a half cents per thousand cubic feet sold.

The settlement between the distributing companies and the receiver is on the basis of gas delivered to and paid for by the ultimate consumer. This results in the receiver standing the loss for all gas that leaks out of the whole system and the bad accounts with consumers.

The Commission allowed 20 per cent for leakage and in many of the distributing plants it is actually much more than that. This requires the receiver to buy at least 25 per cent more gas than he sells. This item cannot be ignored in fixing an adequate rate, for it means that if the receiver

would market 18,000,000,000 feet of gas in a year he must purchase about 25,000,000,000 feet of gas.

The receiver insisted that leakage in the distributing plants should be limited to 10 per cent.

(i) Findings of the enlarged court of three judges.

The enlarged court which heard the application for the temporary injunction reviewed some of the evidence, as follows:

"The crucial question for decision upon this application for an injunction by the court constituted under Section 266 is whether or not the 28-cent rate is confiscatory or unreasonably low. Ten days have been devoted to the reception of evidence and the hearing of arguments. Time has been taken for examination of evidence and briefs for deliberation and consultation.

One of the bases of the conclusion and order of the Commission is the following table, which is copied from its opinion:

TABLE NO. 5.

KANSAS NATURAL GAS COMPANY.

Statement of estimated revenue and requirements for the ensuing year based on 1914 figures, revised, as previously explained, for the state of Kansas.

Requirements.	Transportation.	Kansas.
25,671,445 M. cubic feet gas at 4c	$1,026,857.80	$ 514,045.01
Operating expenses and taxes assigned to transportation	510,536.14	223,245.11
Receivership expenses	32,228.00	14,093.30
Uncollectible gas accounts	12,555.07	6,359.14
Taxes, Kansas City Pipe Line	32,288.27	16,860.51

Taxes, Marnet Mining Company..........	10,497.35	5,316.91
Maintaining organization, Marnet Mining Company............................	690.20	349.59
Total..............................	$1,626,652.83	$ 780,269.57
*Present value of transportation property, $7,083,605.64; depreciation on basis of twelve years........................	590,300.00	268,468.44
Requirements exclusive of a return on property investment....................	$2,216,952.83	$1,048,738.01
*Return on present value...$7,083,605.64		
Add for working capital... 200,000.00		
Total..................$7,283,605.64 at 6%	437,016.35	198,755.00
	$2,653,969.18	$1,247,493.01

ESTIMATED REVENUE.

Gas sales, 1914....................................	$1,192,089.82
†Gas used in compressor station (on basis of use)......	31,737.70
Total....................................	$1,223,827.52
Estimated revenue from proposed increased rates......	171,513.63
Total estimated revenue from Kansas..............	$1,395,341.15
Deduct requirements as above.........................	1,048,738.01
Estimated net revenue...........................	$ 346,503.14
Which is equal to a return of 10.46% on the present value, $3,312,583.83, which is 45.48% to Kansas of the total of $7,283,605.64, or	
Total estimated revenue for Kansas...................	$1,395,341.15
Less requirements, including a 6% return..............	1,247,493.01
Surplus...	147,848.14

*The division of these items between Kansas and Missouri has been made on the basis of the use of the property as shown in Table 1.

†This item is placed here to balance an equal sum included in the expenditures. It is a bookkeeping entry solely.

The Commission found the reproduction value of the property of the gas company less depreciation for age and use to be $7,083,605.64, the prob-

able life of the going concern to be twelve years, amortized the $7,083,605.64 by the allowance of one-twelfth thereof $590,300.00 as a yearly requirement for its operation and allocated all the requirements between Kansas and Missouri on the basis of 45.48 per cent to Kansas and 54.52 per cent to Missouri. The evidence before the Commission, a great volume of evidence which was not before the Commission, including a disclosure of the actual results of the operation of the property during the first four months of the year 1915 under the 25-cent rate which existed before the Commission established a 28-cent rate, and the results of its operation during the first four months of the year 1916 under the 28-cent rate, evidence of the exhaustion of gas fields, of the increase of the cost of gas, of the value of the property of the company, and of every other conceivable issue relative to the general question has been presented to this court. Upon nearly every issue this evidence is conflicting and the determination of some of these issues is difficult. 'And yet,' as the Supreme Court said in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Tompkins,* 176 U. S. 167, 172, 'this difficulty affords no excuse for a failure to examine and solve the questions involved.' Bearing this caution in mind and conceding the present value of the property of the company to be $7,083,605.64 as the Commission found it, a deliberate consideration of the entire case has forced our minds to these findings and conclusions which in our view are determinative of the real question to be decided.

A supply of gas adequate to the reasonable needs of the customers of the natural gas company for domestic lighting, cooking and heating is the real desideratum in this case. Without it no rate will be compensatory. The company now has no such supply; it cannot get such a supply with-

out adequate extensions to its pipe lines. It can make such extensions by the expenditure of a reasonable amount of money. It cannot make such extensions without such money, and it cannot get the money to make them without compensatory rates for the gas it procures and sells. Any rate which will not compensate it for making the necessary extensions to secure such a supply, for paying its other necessary expenses of operation and a reasonable income on the value of its property is unavoidably confiscatory, because without these extensions it must lose its customers, cease its operation, and the value of its property must greatly decrease.

In the earlier days of its operation the natural gas company produced most of its gas from its leaseholds in Kansas, but the fields so leased have been gradually exhausted until it is able to produce therefrom only about 7½ per cent of the gas it transports and sells. In order to get gas it has already extended its pipes far into the state of Oklahoma, where it purchases and transports to the cities of Kansas and Missouri 92½ per cent of its gas. It is conceded that the business of the company is temporary, that the exhaustion of the fields which it can reach with permissible extensions must eventually come, and that the time when it can no longer reach fields from which it can obtain gas cannot be delayed many years. The creditors' agreement of December, 1914, which provided for the payment of the bonded debts of the company within six years and for the expenditure of $1,500,000.00 for extensions and additional gas supply, indicates that they estimated the life of the company as a going concern at six years from that date. The opinion of the Kansas Commission based upon this creditors' agreement provided for the payment of the

bonded debts of the company except the principal of the second mortgage bonds within the six years 1915, 1916, 1917, 1918, 1919 and 1920, and for the expenditure by the receiver for extensions and additional gas supplies of $1,500,000.00. The life of the company as a going concern is necessarily unknown and unknowable, a matter of opinion, and yet the court must determine what it probably is, and a consideration of the evidence, of the history of the gas fields in Kansas and Oklahoma, of the testimony of witnesses familiar with that history, with the fields and with the production, purchase, transportation and sale of gas has brought the minds of all the members of the court to the conclusion that the probable life of the natural gas company as a going concern is approximately six years from this date, June 3, 1916.

The creditors by their agreement provided for an expenditure of $1,500,000.00 within six years from December, 1914, for the extensions of the pipes of the company and an additional supply of gas. The Kansas Commission in its opinion, founded upon that creditors' agreement, made a like allowance. The extensions contemplated have not been made and the exhaustion of the available gas fields has proceeded for seventeen months since the creditors' agreement and for about eleven months since the opinion and finding of the Commission founded upon it. In order to procure and maintain a reasonably adequate supply of gas for the coming winter it is necessary for the receiver to extend the pipe lines fifty or sixty miles and to construct compressors at an aggregate expense of at least $750,000.00 to $900,000.00 during the first year after the filing of this opinion. And it is the opinion of the court that in order to procure and maintain such a supply of gas during the six years of the probable life of the company as a going concern it will be necessary for the receiver to

expend for extensions and compressors at least $750,000.00 the first year and $200,000.00 in each of the five years thereafter, amounting in all to $1,750,000.00. As the life of the company as a going concern is six years the salvage value of the pipes and other materials at the end of the six years when they will be no longer useful in their places in the ground is estimated to be $262,-500.00, and deducting this from the $1,750,000.00 leaves $1,487,500.00 which must be returned within the six years. The Commission in its finding and estimates made no allowance for these extensions.

The Commission allowed $1,026,857.80 yearly for the purchase of 25,671,445 M cubic feet of gas at 4 cents per cubic foot. Gas is constantly becoming more difficult to procure, the cost of it in the fields has increased and is increasing as the fields one after another are exhausted, and the evidence that has been produced before this court has convinced us that the gas requisite reasonably to supply the customers of the natural gas company will cost at least 2 cents per M cubic feet, and that on this account there should be allowed as a part of the requirements of the receiver and the company 2 cents more per M cubic feet yearly than the amount which was allowed by the Commission, that is to say $513,428.90.

The Commission allowed for interest 6 per cent annually on $7,283,605.64, or $437,016.64. The business of and the investment in the property of this gas company is of the most precarious and hazardous nature. Seven per cent per annum is deemed a just and reasonable allowance on investments in railroads and in the property of water, artificial gas and lighting companies of a permanent nature, and at least 8 per cent per annum should be allowed in this case, or an in-

crease of the amount allowed by the Commission of 2 per cent on $7,283,605.64, or $145,672.10.

The Commission allowed $590,300.00, which is one-twelfth of $7,083,605.64, for future depreciation of the property of the company, on the basis that the life of the company as a going concern would be twelve years. As the evidence has convinced that its life will not exceed six years there should have been allowed $590,300.00 more each year during the six years than was allowed by the Commission.

Turning now to the table of the Commission quoted above, the result is that, laying aside other considerations and conceding the substantial correctness of the Commission's other findings for the purpose of the decision of this application for injunction, its estimates of the requirements of the company and of the receiver for the first and the succeeding five years of the life of the gas company as a going concern were too low by the following amounts:

On account of estimating twelve years instead of six years as the life of the going concern by......$	590,300.00
On account of lack of allowance for extensions by	247,916.00
On account of estimate of cost of gas at 4 cents per M cubic feet instead of 6 cents per M cubic feet by	513,428.90
On account of allowance of 6 per cent instead of 8 per cent interest	145,672.10
Total	$1,497,317.00

The Commission assigned to the Kansas property 45.48 per cent of its estimated revenue and requirements; 45.48 per cent of $1,497,317.00 is $680,979.00. The Commission estimated that upon the basis stated in its table a surplus of

$147,848.14 would be produced. Deducting this estimated surplus from the $680,979.00, it appears that its estimated revenue falls short by $533,131.10 of producing an amount sufficient to pay the necessary expenses of the maintenance and operation of the property and business of the natural gas company and a reasonable interest upon the present value of its property.

The experience of the future may, and it is hoped that it will, teach that the necessary requirements of the receiver and the company will be less than those which the evidence convinces the court will be indispensable to provide and maintain an adequate supply of gas for its customers, to operate the business of the company and to return a fair income upon the value of its property. The opinion of the court can rest only on the evidence before it, and upon that evidence it is its opinion that a less rate than 32 cents per M cubic feet will be found insufficient to accomplish this result. But even if there are errors in some of the conclusions to which the court has arrived, and even if they are so great as to reduce the necessary increase of the requirements fixed by the Commission by one-half, still moneys must be provided for the extensions of the pipes of the company, for which the Commission allowed nothing; the amount it allowed for the cost of gas and the interest rate which it fixed were largely too low, twelve years was too high an estimate for the life of the plant, and in the opinion of the court there is no escape from the conclusions that the 28-cent rate is not and will not be compensatory; that on the other hand it is unreasonably low, confiscatory and violative of the Constitution of the United States, and that the complainant is entitled to the interlocutory injunction of this court to prevent its enforcement pending the hearing of this cause upon its merits."

Judge Booth in passing upon the case resolved all doubtful questions against the plaintiff. He eliminated the leaseholds, segregated the transportation from the production, allowed no going value and adopted the very lowest valuation put upon the property, but he found that the probable life of the field was six years instead of twelve, as decided by the Commission, and that therefore the property should be amortized in six years; that the gas would cost the receiver 6 cents in the field instead of 4 cents, as found by the Commission (in fact, it is now costing much more than 6 cents); that the rate of return on the investment should be 8 per cent instead of 6 per cent as allowed by the Commission and that the Commission did not allow enough for annual extensions.

These four items of error in the calculations of the Commission aggregate $1,497,317, and change the 28-cent rate from one of alleged profit to one of real confiscation.

Judge Booth in his opinion (R., pp. 564, 568) sets out the tables of revenue and expenses prepared by the Commission (R., p. 579) and by its attorneys (R., p. 582), and then summarizes his own conclusions (foot of table, R., p. 583) by his own revised and corrected table (R., p. 584), in which he shows that the 28-cent rate falls short of producing 8 per cent on even the lowest valuation of the Commission by $258,051 and short of producing 6 per cent by $174,638, and this without allowing anything for going value or for leaseholds.

The actual experience for 1916 will be of great interest. It follows:

(j) Experience of receiver under the 28c rate.

Judge Booth shows that during the eight months ending August 31, 1916, while the 28-cent rate was in effect, the average price of gas per cubic foot realized by the receiver was 18.27 cents per M feet. During the entire year 1916 the receiver sold for domestic purposes over whole system, including Independence and Coffeyville, 14,170,592,000 feet of gas. Employing the average rate received by the receiver for gas during the period the Commission's rates were in force, to-wit, 18.27 cents per M feet, and the actual experience on other classes of gas, we have the following result (Rec., p. 587):

Sales of domestic gas for year 1916, 14,170,592,000 at 18.27c per M...	$2,608,824.28
Boiler, gas engine and street lights.	523,700.02
Total income 1916 based on Commission rates	$3,132,523.00
Employing the actual operating experience of the company for the year 1916, and the basis used by this court in its opinion of June 3, we obtain the following result:	
Operating expenses, 1916..........	$ 910,030.92
Gas purchased, 1916..............	1,203,547.76
Amortize $7,083,605.64 in six years, as per opinion June 3, 1916.....	1,180,600.94
8% return on investment of $7,283,-605.64	582,688.45
Total necessary revenue.........	$3,876,868.07
Total income (as above)........	3,132,523.30

Deficit resulting from application of Commission's rate to 1916 business . . . . $ 744,344.77
Increase of price for domestic gas over 28c rate to afford proper revenue . . . . 7c per M feet

It will be observed from the foregoing table that instead of the fabulous income which would have resulted to the receiver had he collected the Commission's rate in the cities of Independence and Coffeyville the income would fall $744,344.77 short of making the return on the property which the enlarged court found was necessary for the receiver to obtain in order to operate its plant upon a reasonably profitable basis.

Under the order of this court, and under the bond given by the receiver, the plaintiff has expended $695,938.50 in extensions that are properly chargeable to capital, but upon which a return and proper allowance for amortization should be made.

Return, at 8%, is	$ 55,675.08
Amortize in six years, is	115,989.65
Total	$171,664.83

Summarizing these three errors, and taking as a basis the court's order of June 3, 1916, we have the following:

Error by reason of omitting leases . . .	$213,333.00
Error by reason of omitting going value	493,333.00
Change of conditions by reason of expenditure of $695,938.50	171,664.83
Total necessary additions to revenue to correct errors	$878,330.83

One cent additional in the price of gas to the consumer means $85,000 additional to the receiver, approximately. These added demands make it clear that the receiver is entitled to 10 cents a thousand in addition to the rate suggested by the court in its opinion of June 3d.

Suppose now we take the actual experience shown by the preceding table for the year 1916, which requires a 7-cent increased rate. Eliminate errors above indicated, and the result is that the actual experience of 1916, with fundamental errors eliminated as shown above, an increased requirement of 17 cents per thousand feet, above the 28-cent rate, is necessary to compensate the receiver.

Judge Booth refers to this experience under the 28-cent rate (R., p. 587), and finds an actual deficit after all allowances of $444,344.

Judge Booth's opinion, found at page 564 *et seq.* of the record, is a full and clear discussion of the inadequacy of the 28-cent rate. It is so succinct that quotations are impossible. The whole opinion will be of absorbing interest to this Court.

The Binding Force of the Supply Contracts on the Receiver.

There are four reasons why these supply contracts are not binding on the receiver, *viz.:*

(a) They have never been adopted by the receiver.

(b) They are void because of the exclusive features and provisions, making them violative of public policy and the Federal and Kansas Missouri Anti-Trust Acts.

(c) Changed conditions have terminated all obligations of the supply contracts.

All these propositions are set forth in the findings of fact and order made by Judge Flannelly on October 16, 1916 (Rec., p. 548) and approved on appeal from said decision by the Supreme Court of Kansas, 102 Kan. 712, l. c. 717.

(d) The bases of the supply contracts (the rate provisions of the franchise ordinances) are void for want of power in the cities and inoperative because violated and disregarded by the cities. Therefore, the supply contracts so far as rates are concerned do not bind anyone.

(a) They have never been adopted by the receiver.

Judge Flannelly, after making certain findings of fact, announced the following conclusions of law, and made the following order:

> "1. That neither the receiver of this court, nor the receivers of the United States Court, have by their acts or otherwise adopted any of the supply contracts with the various distributing companies.
>
> 2. That the supply contracts with the dis-

tributing companies, whose plants are located within the state of Kansas, are invalid, illegal and void, being in violation of the laws of this state and of the United States, and are not binding on the receiver.

3. That the supply contracts with the distributing companies, whose plants are located in the state of Missouri, are invalid, illegal and void, being in violation of the laws of the state of Missouri and of the United States, and are not binding on the receiver.

4. That the conditions mentioned in the various supply contracts upon the happening of which the contracts were to become inoperative and void have long since occurred, and the receiver is unable to furnish the distributing companies with gas under the terms of said supply contracts.

5. That the said supply contracts are improvident, wasteful and destructive of the estate of the Kansas Natural Gas Company and should be disavowed.

ORDER.

It is therefore considered, adjudged and decreed that none of the distributing contracts aforesaid are binding upon, or effective against, said receiver, and that he should not, and is hereby forbidden to, deliver natural gas to any of said distributing companies under the distributing contracts formerly existing between the Kansas Natural Gas Company and said distributing companies, respectively; and he is hereby ordered to deliver natural gas to such of said distributing companies as will receive the same at the rates and prices, and on the terms named in the schedule of rates and prices heretofore promulgated by said receiver to said distributing companies, respectively; and the acts of said

> receiver in promulgating said schedules are hereby approved.
>
> And this court, recognizing that its power does not extend beyond the state of Kansas, hereby directs said receiver to present to the United States District Court for the District of Kansas, First Division, the foregoing findings of fact and conclusions of law and this order, and to pray said Federal Court for such orders as will effectuate the law applicable to the Kansas Natural property in Missouri and Oklahoma, and thus bring the same in operative harmony with the Kansas Natural property in Kansas, to the end that the public may be served and said property preserved."

We invite the Court's special attention to the very full findings of fact upon which Judge Flannelly based the above conclusions and order. (Rec., p. 548.) These findings contain references to and quotations from the distributing contracts and city ordinances pertinent to this controversy.

This order of Judge Flannelly was adopted by the lower court in its order of June 5, 1917, adopting all the administrative orders of the District Court of Montgomery County, Kansas.

Judge Booth held these supply contracts were not binding on the Receiver. (Rec., pp. 619, 623.)

The contention of defendants that these contracts have been adopted by the course of business followed by the Receiver is no different from the contention of the Kansas City Pipe Line Company made and decided on appeal in 217 Fed. 187, l. c. 195. The Court of Appeals held that this Receiver

by his method of conducting the business had not adopted the lease contract of the Kansas Natural with the pipe line company, and if he did not adopt that contract by his course of business he did not adopt these supply contracts by his course of business in reference to them. The argument in both cases is presented by the same counsel. In the opinion of the Circuit Court of Appeals Judge Hook specially mentioned the order of October 9, 1912, appointing receivers, and said that in the face of such order the Receiver would not be held to have adopted such contract by his course of business. The language of that court is as follows:

> "We turn to the claim of the pipe line company and its mortgage trustee. In appointing its receivers the court below reserved to itself the power to approve or disapprove leases and contracts and none were to be taken as adopted without its express order. No such order had been made as to the lease in question. The pipe line company has never formally asked the court below to adopt or disaffirm the lease. It relies for adoption upon administrative acts of the federal receivers, but they are not sufficient in this case. It has no lien, as claimed, upon the entire estate by the Kansas Natural Gas Company or the income from the receivers' operation."

On December 30, 1912, the United States District Court of Kansas fixed a schedule of rates for the sale of natural gas by its receivers higher than the supply contract rates. (Rec., p. 21.) Not only did the court below thus disavow the supply contracts, but it also in addition provided for the

collection of charges as measured by meters placed at the points where the systems of the distributing companies connected with the mains in charge of the receivers. Thus was the method of doing business changed entirely. Instead of the distributing companies receiving a percentage of the gross cash receipts and sustaining no part of the loss by leakage and bad bills they became directly responsible for all bad accounts and the entire leakage within their distributing systems. It is true this order was never enforced in its entirety, but it is a complete answer to the contention of the Wyandotte County Gas Company and the Kansas City Gas Company (see their brief, p. 73) that the supply contracts have never been disavowed by the court below. This action of the court below completely disavowing the supply contracts not only with the two companies named, but also with all other distributing companies, is set forth in the bill of complaint herein. (Rec., p. 21.)

(b) The exclusive features of the supply contracts.

The supply contracts are void because of exclusive purchase and sale provisions contained in them. The Wyandotte County Gas Company and the Kansas City Gas Company's contracts are almost identical in these provisions. The provisions of the Wyandotte County Gas Company's contract are set out in full. (Rec., p. 551.) The Kansas City Gas Company's contract was introduced at the hearing, and the exclusive provisions are found. (Rec., p. 846.) These two contracts are illustrative of all the supply contracts and the exclusive

provisions are violative of the statutes of Missouri and the Sherman Anti-Trust Act. The Supreme Court of Kansas held that these provisions invalidated contracts in Kansas, in the case of *State* v. *Kansas Natural Gas Co.*, 17977. (Rec. 559.)

In *Montague & Company* v. *Lowry*, 193 U. S. 38, an association was formed in California by manufacturers and dealers in tiles, mantels and grates. The dealers agreed:

> "Sec. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association; neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association.
>
> Sec. 8. Manufacturers of tile or fireplace fixtures or resident or traveling agents or manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel and Grate Association of California shall forfeit their membership in the association."

Suit was brought under the Federal Anti-Trust Act for three-fold damage to business by reason of violation of the Act. The question was whether the agreement was in violation of the Anti-Trust Law. Justice Peckham, speaking for the court, said that by reason of this agreement the market for tiles was narrowed and the prices charged to non-members was more than double, and that the

whole agreement became part of a purpose which when carried out amounted to a contract or combination in restraint of interstate commerce.

> "The plaintiffs, however, could not, by virtue of any agreement contained in such association, be legally put under obligation to become members in order to enable them to transact their business as they had theretofore done and to purchase tiles as they had been accustomed to do before the association was formed. * * * The agreement directly affected and restrained interstate commerce.
>
> The case we regard as a plain one, and it is unnecessary to further enlarge upon it."

An illegal combination or trust cannot resort to equity to enforce a contract or sale calculated to perpetuate the illegal features of the combination.

American Biscuit Co. v. *Klatz,* 44 Fed. 171.
Consol. Wall Paper Co. v. *Voight,* 148 Fed. 950, S. C., 212 U. S. 262.

As the statute makes the contract itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court.

8 Enc. of Sup. Ct. Dec. 448.
Bement v. *National Harrow Co.,* 186 U. S. 70, 88.
U. S. v. *Joint Traffic Assn.,* 171 U. S. 505.
Northern Sec. Co. v. *U. S.,* 193 U. S. 197, 331.
Harriman v. *Northern Sec. Co.,* 197 U. S. 244.

See also:

State v. *Smiley,* 65 Kan. 240.
State v. *Standard Oil Co.,* (Mo.) 116 S. W. 902.

Standard Oil Co. v. *Missouri*, 224 U. S. 270.
U. S. v. *American Tobacco Co.*, 221 U. S. 106.
U. S. v. *Standard Oil Co.*, 221 U. S. 1.
International Harvester Co. v. *Missouri*, 234 U. S. 199.

(c) Changed conditions have terminated all obligations of the supply contract.

The contract between the Kansas City Pipe Line Company and Small, McGowan and Morgan, which by successive assignments became the contract between Kansas City Gas Company and Kansas Natural Gas Company, contains the following provisions:

> "Whereas, the party of the first part is the owner of gas lands and leases in the gas belt of Kansas and a pipe line for the conveying of natural gas from the gas fields in the state of Kansas to a point at or near the city limits of Kansas City * * * and whereas the parties of the second part are the owners of an ordinance in the city of Kansas City, Missouri, * * * and desire to secure a supply of gas for said city and its inhabitants * * * the party of the first part agrees that it will during the period of such ordinance or any extension or renewal thereof * * * supply and deliver through its said pipe line or lines to said parties of the second part * * * natural gas in such amount as will at all times fully supply the demand for all purposes of consumption as provided in this contract * * *. However, as the production of gas from the wells and the conveying of it from long distances is subject to accidents and in-

> terruptions and failures, the party of the first part does not under this contract undertake to furnish the parties of the second part with an uninterrupted supply of gas for the period named herein, but only to furnish such supply for such a period of time as the *wells* and *pipe lines* of the party of the first part and such other resources as the party of the first part shall be able to command are capable of supplying."

Ordinance No. 33887 (Rec., p. 838) was enacted with a distinct understanding that natural gas was to be supplied only under the conditions of the contract, Exhibit No. 1001-C. Section 14 thereof provides:

> "Should the supply of natural gas obtainable by grantees reasonably accessible be at any time hereafter during the life of this ordinance inadequate to warrant them in continuing to supply natural gas under the terms of this ordinance, or should the common council of Kansas City, Missouri, find at any time (and in the event of any disagreement as to the facts in this respect either party or a gas consumer may have recourse to the courts to establish the facts), they shall not be longer required to do so, but shall manufacture and furnish manufactured gas to said city and its inhabitants through said mains and pipes under the provisions of this ordinance, as far as applicable and subject to all the terms and provisions contained in the Ordinance No. 6658 * * *."

A careful examination of these contracts leads to the following conclusion: That the contracts were originally binding on Kansas City Pipe Line

Company and required the supplying of gas from the gas wells and pipe lines of that company in the gas fields of Kansas. The contract (Rec., p. 857) by which the Kansas Natural Gas Company assumed to perform these contracts obligated the Kansas Natural to perform such contract only and to supply 50 per cent of the gas produced *from its own wells.*

The evidence of Mr. Hays (Rec., p. 1102), the affidavit of Mr. Wyer (Rec., p. 1135 and Exhibits "E" to 2, inclusive) and the Missouri defendants' Exhibit 1001 make it clear that the gas wells of the Kansas City Pipe Line Company and the gas fields of Kansas reasonably accessible to the pipe lines of the Kansas City Pipe Line Company have long since become exhausted, and that the Kansas Natural Gas Company has long since ceased to be a *producing* company and is now a *purchasing* company.

The lease contract between Kansas City Pipe Line Company and Kansas Natural provides:

> "5th. The lessee hereby assumes and covenants to perform all the obligations assumed by the lessor under the terms of an agreement * * * dated November 17, 1906, between the lessor and Hugh J. McGowan, Charles E. Small and Randall Morgan for the supply of natural gas to Kansas City, Missouri, * * * as amended by an agreement dated December 11, 1907. * * * The lessee hereby assumes and covenants to perform all the obligations assumed by the lessor under the terms of all other contracts now in force and binding upon the lessor. * * * The lessee agrees that if the gas

> wells hereby demised situate in the territory of the lessor do not furnish a sufficient volume of gas, or if the pipe line of the lessor shall not have a delivery capacity sufficient to supply the demands for gas in the cities of Kansas City, Kansas, and Kansas City, Missouri, it, the lessee, will supplement said gas supply *from its own gas wells* up to an amount equal to 50 per cent of the gas which, by the use of due diligence in connecting existing wells and drilling new ones, it may be able to produce from the territory now or hereafter controlled by it." (Rec., p. 857.)

The contract recites that the Pipe Line Company is the owner of "gas lands and leases in the gas belt of Kansas," and the contract is predicated upon this recital. This is contained in a "Whereas" clause and according to universal rules of construction is conclusive evidence of the matters in the minds of the parties at the time the contract was made. (Rec., p. 844.)

But we are not confined to aids in construction. In the covenants of the contract it is found that the obligation of the Kansas City Pipe Line Company, after reciting the hazards of the business, limits the obligation of the Pipe Line Company by these words:

> "but only to furnish such supply for such a period of time as the wells *and* pipe lines of the party of the first part and such other resources as the party of the first part shall be able to command are capable of supplying." (Rec., p. 845.)

There is no ambiguity about this language. After reciting that the company owned certain

gas lands and leases in Kansas the agreement is made only to furnish gas as long as the "wells" and pipe lines are capable of supplying. Observe that the connecting word is "and." If the wells give out—wells on the gas lands and leases of the first party in Kansas—the contract obligation is gone; or, if the wells stand up and the pipe line fails, then the obligation ceases. The phrase "and such other resources as the party of the first part shall be able to command" doubtless means such other leases and wells as they can reasonably acquire. It is one of those general phrases so often found in contracts which must be construed by the rule of reason or they become absurd. It cannot mean that the obligation lasted as long as gas remained in the world which might be obtained by the unstinted use of means or money.

It will be noted, then, that the Pipe Line Company only agreed to furnish gas as long as the wells lasted, and reference was expressly made to the Kansas fields. It is undisputed that these wells, and these fields, *belonging to the Pipe Line Company as well as the Kansas Natural, have been exhausted*, not only in Kansas, but in Oklahoma, for several years. These facts are in the record in many places.

Under the contract in question it is probably true that the Kansas Natural could not be compelled to buy from outside sources any gas to supplement its own supply in order to furnish better service to the distributing companies, but could stand on its contract and furnish gas as long as its wells in its Kansas fields lasted; but certainly when its own wells, not only in Kansas,

but in Oklahoma, become exhausted, and its own leases have been depleted, and it has bought and bought to enable itself to furnish a supply, it cannot be held under the contract when it is compelled to buy more than nine-tenths of its supply, at a price prohibitive under the contract.

Two other agreements were entered into about the same time which throw light upon this situation, although it would seem unnecessary to go beyond the contract itself. The parties who entered into the above referred to contract with the Kansas City Pipe Line Company, secured a franchise from the city of Kansas City, through which they expected to sell the gas purchased from the Pipe Line Company. In this ordinance this provision occurs:

> "Should the supply of natural gas, obtained by grantees reasonably accessible, be at any time hereafter during the life of this ordinance inadequate to warrant them in continuing to supply natural gas under the terms of this ordinance, * * * they shall not be required longer to do so, but shall manufacture and furnish manufactured gas," etc. (Rec., p. 838.)

The grantees under the ordinance are not compelled to furnish gas to the city except as long as it may be "reasonably accessible." What is reasonably accessible? We do not know, and this court is not called upon to determine with any degree of exactness. It certainly will not be contended that a gas field which has receded from Kansas into Oklahoma, from a territory a hundred

miles away to one nearly three hundred miles distant, is still reasonably accessible. Under all the circumstances of the case, it was the field at the time the ordinances were made, the then large supply of leases and wells owned by the supply companies, and it certainly cannot be contended that the present situation was within either the contemplation of the parties or the terms of the contract.

Later the Kansas Natural Gas Company entered into a contract with the Kansas City Pipe Line Company which had for its subject the contract between the Kansas City Pipe Line Company and the predecessors of the Kansas City Gas Company. In the ordinance referred to, one party to this contract contracted with the city concerning the contract in question; now we have the other party to the same contract contracting with the Kansas Natural concerning the same contract. In this latter contract, it is equally clear that the parties had in contemplation wells and leases owned by them in Kansas. Note:

> "The lessee (the Kansas Natural) agrees that if the gas wells hereby demised situate in the territory of the lessor do not furnish a sufficient volume of gas * * * the lessee will supplement said gas supply from its own gas wells up to an amount equal to fifty per cent of the gas which by the use of due diligence in connecting existing wells and drilling new ones it may be able to produce from the territory now or hereafter controlled by it." (Rec., p. 857.)

The contract itself limits the obligation of the Kansas Natural to its own wells in Kansas; each party to that contract construed it about the time of its execution by contracts with third parties, and in each instance the interpretation put upon it by the parties is in accord with its terms. There can be no other interpretation put upon it.

If any other aid to construction is desired, it is found in the common sense of the situation. Unless absolutely compelled to do so by the language of a contract, the courts will not impute to parties an intention which leads to a business absurdity. In striving to arrive at the real intention of the parties, the court will place itself in the position of the parties and not impute to them an intention which would lead to business suicide. The Kansas City Pipe Line Company might very well and very sensibly agree to furnish gas from its own leases for a period of years at a given price; with some degree of certainty the cost of drilling and transporting may be figured on. But to agree, for a term of years, to furnish gas it did not own at a stipulated price would be the most extensive deal in futures yet recorded. To agree absolutely to furnish tremendous quantities of gas at a fixed price, when that would certainly involve the purchase of such gas in an open and wildly fluctuating market, is a business absurdity. Fortunately the parties did not so contract; they contracted to sell their own gas and no other.

In a controversy in the Western District of Missouri, between the Kansas City Gas Company and the City of Kansas City, Missouri (both of whom are defendants in this suit, Judge Van

Valkenburgh had occasion to pass upon the franchise and supply contract here involved. The case is reported in 198 Fed. 500, and contains a very full discussion of the matter. We ask the court to give full consideration to that case, but we desire to refer specially to the following parts of the opinion.

In speaking of the franchise, the court said:

> "It was originally contemplated and understood by both parties that the supply should be taken from Kansas fields as nearest and most accessible to Kansas City."

The franchise is incorporated into the supply contract, and the same understanding must have existed between the parties to the supply contract. The court there said:

> "It is well recognized that natural gas is more or less elusive, unstable and uncertain. It is produced by nature in indeterminate quantities, not by man, according to fixed and controllable laws of production."

The court then quotes from Thornton, stating the rule to be that in case of the failure of natural gas, such failure would be a defense to the nonperformance of a contract where the company had made all efforts to furnish gas.

Again, the court, in speaking of the contract there interpreted, stated:

> "It was well understood that natural gas would eventually fail, and that when it did it would do so by degrees and not abruptly."

On page 523, the court once more called attention to the fact that it was in the contemplation of the parties that the supply would gradually fail, and that such a point had evidently been reached at that time (1912).

(d) The bases of the supply contracts (the rate provisions of the franchise ordinances) are void for want of power in the cities and inoperative because violated and disregarded by the cities. Therefore the supply contracts so far as rates are concerned do not bind anyone.

Before the franchise ordinances have any bearing whatever on this case it must be determined that the supply contracts are valid, subsisting and binding upon the receiver as to rates to be charged by him.

Let us concede for the moment that this question has been so decided. The next question, then, is: Are the franchise ordinances binding upon anyone? If not, of course they do not bind the receiver.

First let us consider the Kansas ordinances. In cities of the first class, such as Atchison, Topeka, Kansas City, Kansas, and Leavenworth, the power to making a binding contract as to natural gas rates has never existed. *State ex rel.* v. *Wyandotte County Gas Company*, 88 Kan. 165 (affirmed by this Court after reaching the same conclusion independently, 231 U. S. 622, 34 S. Ct. 226). Thus as to the principal cities of Kansas supplied by the receiver, the franchise ordinances did not constitute contracts and are not binding upon anyone. If it is insisted under *City*

of Emporia v. Emporia Telephone Co., 88 Kan. 437, 443, that such a provision, although not constituting a contract, estops the public utility from increasing the rates until set aside by the state, we submit that the state of Kansas through its Public Utilities Commission, by prescribing rates to be charged for the sale of natural gas (we refer to both the 25-cent order and the 28-cent order), has waived and released the estoppel.

No city in Kansas at this time can require anyone to observe the franchise ordinances. In every instance the cities have violated the terms of the ordinances by requiring the companies to keep in force and effect rates lower than those named in the various ordinances. In all the Missouri river towns, after December 1, 1911, the natural gas companies were entitled to charge 27 cents per thousand cubic feet. Yet the cities in conjunction with the Public Utilities Commission of Kansas required the maintenance until December, 1915, of a rate of 25 cents per thousand, which rate was admittedly non-compensatory and confiscatory. (See statement of the Supreme Court of Kansas to this effect in 96 Kan. 372.)

Not only did the cities violate the terms of the franchise ordinances and by threats require the maintenance of rates lower than those prescribed in the ordinances, but they have at all times refused to recognize the ordinances as controlling. They have for some years insisted by appearances before the Public Utilities Commission of Kansas and by proceedings in courts, and even now are insisting in this Court, that the Public Utilities Commission alone has authority to name the rates

to be charged, and that the rates prescribed by these franchise ordinances are of no effect. Having thus repudiated the ordinance rates, the cities cannot now or hereafter insist that anyone is bound by the rates mentioned in the ordinances. *It is elementary that he who first violates a contract cannot thereafter compel the other party to observe such contract.* This principle is too well recognized, based as it is on the very fundamentals of justice, to require the citation of authority to support it. So here the cities by their attitude, by their violation of the rate provisions of the ordinance, have placed it beyond their power to demand the observance of the rate provisions of such ordinances from anyone. Hence these ordinances, so far as they affect cities in Kansas, do not control as to rates.

The same conditions exist as to the Missouri cities. Under the provision of the Constitution of Missouri, cities have never had the power to make binding contracts as to rates. *City of Fulton* v. *Public Service Commission*, 204 S. W. 386; *Kansas City Bolt & Nut Co.* v. *Kansas City Light & Power Co.*, 204 S. W. 1074; Brief of Kansas City Gas Company, pp. 77-83. So as in the case of the Kansas towns there is a lack of mutuality as to the rate provisions, and the ordinances do not constitute binding contracts between the cities and the distributing companies, as to rates.

Likewise all of the Missouri cities have insisted and have filed proceedings before the Public Service Commission of Missouri asking that body to prescribe the rates to be charged in the several cities. (Rec., pp. 360, 397, 402, 403, 404, 405,

293.) It is true in some instances that the distributing companies have made the applications to the Commission to change the rates and the cities have consented to the jurisdiction of the Commission. This is particularly the case in Kansas City, Missouri, where the Kansas City Gas Company and the city of Kansas City, Missouri, both consented to and recognized the authority of the Commission to prescribe rates for natural gas. (Rec., p. 365.) The Kansas City Gas Company contends in this Court that its rates are legislative and therefore cannot be contractual. (See brief of Kansas City Gas Company and Wyandotte County Gas Company, pp. 77, 80.) Thus, so far as the receiver is concerned, both the cities and the distributing companies in Missouri have repudiated the rate provisions of the ordinances and have refused to recognize them as binding on either party. Having refused to recognize the force of the ordinances as contracts, the cities cannot require that the ordinances shall measure the rates to be charged by the receiver. So it is that even if this Court should determine the supply contracts are binding on the receiver, yet the rates to be charged are those established by the receiver under order of the court appointing him, and not the rates named in the franchise ordinances repudiated by all parties.

If this Court adopts the same view as that of the District Court of Montgomery County, Kansas, approved by the Supreme Court of Kansas (102 Kan. 717), and as that of the United States District Court of Kansas, that the supply contracts are not binding on the receiver, then the

force and effect of the rate provisions of the franchise ordinances become immaterial. This is true whether this Court accedes to the position of the Supreme Court of Kansas, that the distributing companies act solely as the agents of the receiver in the distribution of the natural gas, the ownership of which continues in the receiver until delivery to the consumers, or to the position of the Missouri defendants that the distributing companies are not the agents of the receiver. Under the first view, as the natural gas is owned by the receiver he is not limited by the rate provisions of the franchise ordinances to which he is not a party or privy by contract or otherwise. If the Missouri view attains, the receiver is not compelled to furnish natural gas to the distributing companies until satisfactory arrangements are made with him and approved by the court whose receiver he is. The distributing companies and the cities will be obliged to make suitable terms with the receiver or secure their gas elsewhere. It follows that inasmuch as the supply contracts are not binding on the receiver, the validity of the franchise ordinances is not involved in this suit. For these reasons the court below deemed it unnecessary to pass upon the validity of the franchise ordinances or the validity of the supply contracts as between the distributing companies and the Kansas Natural Gas Company.

Summary as to Supply Contracts.

1. In April, 1912, the Supreme Court of Kansas decided that the supply contracts were void because of their exclusive provisions.

2. The United States District Court for the District of Kansas in October, 1912, declared them not binding on its receivers until an order was made by the court making them so. No such order was ever made.

3. On December 30, 1912, the court below directed its receivers to charge schedules of rates entirely different from the supply contracts and provided for a different method of doing business than that provided by the supply contracts. Thus definitely were the supply contracts disavowed by the court below. (R., p. 21.)

4. The District Court of Montgomery County, Kansas, in its order of October 16, 1916, held that these supply contracts were not binding on the receiver. An appeal was taken from this order by the Wyandotte County Gas Company and the Kansas City Pipe Line Company to the Supreme Court of Kansas, and that court in dismissing the appeal said there was no substantial difference between its views and the order made by the District Court of Montgomery County, Kansas.

5. On June 5, 1917, the court below in adopting all administrative orders of the District Court of Montgomery County, Kansas, necessarily adopted the order of October 16, 1916, directing the receiver to disregard these supply contracts.

6. In the decree in this cause (Rec., p. 623) and in the opinion of Judge Booth (Rec., p. 619) these

supply contracts were held not to be binding upon the receiver.

7. The United States Circuit Court of Appeals, Eighth Circuit, in the case of *Kansas City Pipe Line Company* v. *Fidelity Title & Trust Company*, 217 Fed. 181, in considering the Kansas City Pipe Line Company's lease, decided that the receivers of the court below by their administrative acts had not adopted the lease. And the rule applicable to that lease is the same as that relating to the supply contracts.

8. Changed conditions have long since terminated all binding obligations of the supply contracts, especially in view of the fact that the receiver purchases most of his gas now, whereas the supply contracts contemplate the production of gas by the Kansas Natural Gas Company.

9. Inasmuch as the franchise ordinances, which were the basis of the supply contracts as to the matter of rates, are void for want of power in the cities, and inoperative because violated and disregarded by the cities, the supply contracts, so far as the question of rates is concerned, are not binding on anyone, whether the business conducted is interstate or intrastate commerce in its character.

Answer to Certain Portions of Brief of the Cities of Kansas City, Joplin and St. Joseph, Missouri.

Without pausing to correct the many misstatements of fact found in the brief of the above parties, we ask the indulgence of the Court to reply to a few points raised by these appellants:

Appellants' Brief, p. 35. The purpose of Section 56 of the Judicial Code is not only to aid in the collection of assets, but to protect those assets from dissipation after they are once collected. To prevent the assets of the Kansas Natural Gas Company in the possession of the United States District Court for the District of Kansas from being taken without compensation and without due process of law was the purpose of the suit instituted in the court below. Collection of assets without protection of those assets when collected would be a vain and futile thing. We submit that Section 56 of the Judicial Code necessarily covers the protection of assets as well as the collection thereof.

Appellants' Brief, p. 36. The contention found on this page that there was no receiver of the United States District Court for the District of Kansas in charge of the property in Kansas, and hence the retention of the possession of the property in Missouri by that court was illegal, is neither new nor original. Counsel for the receiver appointed by the state court made the same contention at length in the Circuit Court of Appeals, Eighth Circuit, but that court decided the point adversely to such contention. *Kansas City Pipe Line Company v. Fidelity Title & Trust*

Company, 217 Fed. 187. Whatever we might say on the subject is so much better stated in that opinion that we refer to that case as containing a full statement of the law on the subject.

However, there was a receiver of the United States District Court for the District of Kansas who was in possession of the reversionary interest in said property located in Kansas and who held potential possession of the property within the state of Kansas under the decree turning over the property within the state of Kansas to the state receiver, and actual possession of certain funds of the Kansas Natural Gas Company estate. (Rec., pp. 16, 1003.) This was George F. Sharitt, one of the defendants who sought in this suit the same relief as prayed for by the plaintiff herein, and who should be aligned with the plaintiff as a party plaintiff in determining the question of jurisdiction. It follows that the proposition of the defendants is sustained neither by the law nor the facts.

Appellants' Brief, p. 53. The franchise ordinance of Kansas City, Missouri, was not a contract so far as the matter of rates was concerned. The Supreme Court of Missouri has recently decided that under the terms of the Constitution of that state in force at the time this ordinance was passed and accepted, a city of Missouri cannot make a binding contract as to rates. *State* v. *Public Service Commission*, 204 S. W. 497; *Kansas City Bolt & Nut Co.* v. *Kansas City Light & Power Co.*, 204 S. W. 1074. Moreover, the decree of the United States District Court did not attempt to release the Kansas City Gas Company

from the obligation of its franchise ordinance. The decree merely released the receiver, who was not a party to such franchise ordinance, from furnishing his gas to consumers in Kansas City, Missouri, under the terms of the supply contract with the Kansas City Gas Company, which contract he had never adopted. The binding force of the supply contract on the receiver was directly raised by the pleadings.

Appellants' Brief, pp. 38, 39. The cities in question aided and assisted the Public Service Commission of Missouri in suspending the rates established by the receiver, and in having the Commission fix rates which were non-compensatory and in refusing to accept the rates put into force by the receiver, after the preliminary injunction had been granted by the three federal judges. (Rec., pp. 360, 398, 403.)

The portion of the above brief devoted to a discussion of the interstate character of the business transaction by the receiver will be answered in connection with the discussion of interstate commerce contained at another point herein.

Interstate Commerce in Natural Gas as Discussed in Appellants' Briefs.

For the convenience of the Court we collect and print together the following parts of the record relating to interstate commerce:

Judge Booth's ten propositions of law in regard to interstate commerce are as follows (Rec., p. 591):

The following propositions which have a bearing upon the instant case seem to be well established:

(1) Interstate commerce begins when the goods are delivered to the carrier for transit from a point in one state to a point in another, or are actually started on their ultimate passage.

> *Coe* v. *Errol,* 116 U. S. 517, 525.
> *General Oil Co.* v. *Crain,* 209 U. S. 211, 229.
> *T. & N. O. C.* v. *Sabine Co.,* 227 U. S. 111.
> *La. Ry. Comm.* v. *Ry.,* 229 U. S. 336.
> *Ill. Cent. Ry. Co.* v. *La. Ry. Comm.,* 236 U. S. 157.
> *McClusky* v. *Ry.,* 242 U. S.

(2) Interstate commerce ends when the shipment reaches its intended destination, and except where Congress has expressly otherwise provided, the protection afforded to an interstate shipment includes the right to sell by the person introducing the goods; at least, up to the time when they have become commingled with the general property of the state; and where the goods are introduced in

the original packages, commingling does not take place until the original package is broken.

> *Brown* v. *Maryland,* 12 Wheat. 419.
> *Am. Exp. Co.* v. *Iowa,* 196 U. S. 133.
> *Savage* v. *Jones,* 225 U. S. 501, 520.

(3) The intent and purpose of the party making the shipment have an important, if not controlling, bearing upon the question of where the interstate journey ends.

> *Swift & Co.* v. *United States,* 196 U. S. 375.
> *So. Pac. Term. Co.* v. *Int. Com. Com.,* 219 U. S. 498.
> *Ohio Ry. Com.* v. *Worthington,* 225 U. S. 101.
> *T. & N. O. R. Co.* v. *Sabine Co.,* 227 U. S. 111.
> *La. Ry. Com.* v. *Ry.,* 229 U. S. 336.
> *Ill. Cent. Ry.* v. *La. R. R. Com.,* 236 U. S. 157.
> *United States* v. *Ill. Cent. Ry.,* 230 Fed. 940.

(4) A change of carriers or plurality of carriers does not affect the status of the interstate shipment:

> *T. & N. O. R. Co.* v. *Sabine Co.,* 227 U. S. 111.
> *So. Covington Ry.* v. *Covington,* 235 U. S. 537.
> *Atchison Ry.* v. *Harold,* 241 U. S. 371.

(5) Change of ownership of the property during transit does not necessarily affect the status of the shipment.

Swift & Co. v. *United States,* 196 U. S. 375.
Gulf Ry. v. *Texas,* 204 U. S. 403.
Atchison Ry. v. *Harold,* 241 U. S. 371.

(6) Employment of an agent at the point of destination to effect delivery to the ultimate consignee does not destroy the character of the shipment.

Caldwell v. *N. C.,* 187 U. S. 622.
Rearick v. *Pennsylvania,* 203 U. S. 507.
Stewart v. *Mich.,* 232 U. S. 665.
Davis v. *Va.,* 236 U. S. 697.
Grand Union Tea Co. v. *Evans,* 216 Fed. 791.

(7) The time and place at which the title to the goods passes as between the seller and buyer is not controlling upon the character of the shipment.

Norfolk Ry. v. *Sims,* 191 U. S. 441.
Penn. R. R. v. *Coal Co.,* 238 U. S. 456, 468.
Penn. R. R. v. *Sonman Co.,* 37 S. C. R. 46.

(8) The parties, shipper, carrier and consignee may be three separate parties, or a less number.

Kelly v. *Rhoads,* 188 U. S. 1.
Rearick v. *Penn.,* 203 U. S. 507.
Ohio R. R. Com. v. *Worthington,* 225 U. S. 101.
Stewart v. *Michigan,* 232 U. S. 665.

Oil Pipe Line Cases, 234 U. S. 548.
Kirmeyer v. *Kansas*, 236 U. S. 568.
City of Lee's Summit v. *Jewell Co.*, 217 Fed. 965.

(9) Absence of a specific consignee at the time of shipment does not alter the character of the shipment.

Swift & Co. v. *United States*, 196 U. S. 375.
T. & New Orleans R. C. v. *Sabine Co.*, 227 U. S. 111.
Grand Union Tea Co. v. *Evans*, 216 Fed. 791.

(10) The exact destination need not be fixed at the time of the shipment provided the intent and purpose is to continue the journey beyond the limits of the state in which the journey begins.

Ohio R. R. Co. v. *Worthington*, 225 U. S. 101.
T. & N. O. R. Co. v. *Sabine Co.*, 227 U. S. 111.

Judge Booth's quotation from the opinion of the Supreme Court of Kansas in the case of *State ex rel.* v. *Flannelly*, 96 Kan. 372, showing how the business of transportation and sale of natural gas is conducted, follows (Rec., p. 590):

"(A) In determining the question whether the transactions carried on by the receiver constitute interstate commerce, it will be helpful to have clearly in mind just what those transactions are. The Supreme Court of the State

of Kansas in *State ex rel. Flannelly, supra*, has stated the matter as follows:

'The gas sold by the receivers is produced in both Kansas and Oklahoma. It is transported from the wells through pipe lines beginning in Oklahoma, entering the state of Kansas near Coffeyville, at which place gas is first distributed and sold to consumers. The remainder is transported north through pipe lines into which gas from wells in Kansas is conveyed, and the gas from Oklahoma and Kansas is then transported through the same pipe lines and through compressing stations to Independence and north and east throughout this state, and after supplying the consumers in this state, it is transported into the state of Missouri, where it is sold to other consumers. After the gas from this state is discharged into the pipe lines with the gas from Oklahoma, it is impossible to distinguish one from the other or to separate one from the other. About 85 per cent of the gas sold is produced in Oklahoma, and 15 per cent is produced in Kansas. About 60 per cent of the gas sold is sold in Missouri and 40 per cent is sold in Kansas. The gas sold in Kansas is delivered to the consumers thereof, in the several cities by distributing companies operating under franchises obtained by the distributing companies from the cities, fixing the rates charged customers for gas. These distributing companies act as agents for the Kansas Natural Gas Company in the distribution and sale of gas. The price received for gas is divided between the distributing companies and the receivers on a percentage basis. The gas is not sold by the receivers to the distributing companies. It is delivered from the pipe lines of the Kansas Natural Gas Com-

pany, under the control of the receiver, into the pipe lines of the distributing companies, and is through these pipe lines conveyed from the pipe lines of the Kansas Natural Gas Company to the consumers. The gas is consumed as fast as it is sold, and is consumed immediately after passing through the meter measuring the gas to consumers.' "

Judge Booth's analysis of how the business of the receiver is conducted as contained in his opinion (Rec., p. 593):

"Reverting to the character of the business transacted by the receiver, it is to be noted.

(a) That the shipment is started on its journey from one state to another, (b) with the purpose that it shall be delivered to a consumer, (c) that it moves continuously from a point of shipment in one state to the consumer in another state, (d) that it is moved part of the way in the pipe lines of the receiver, and part of the way in the pipe lines of the distributing company; whether as agent of the receiver or as connecting carrier is immaterial. (e) The destination of the shipment is intended at the time of the shipment to be beyond the state, although the name of the particular consumer for any specific portion of the gas shipped is not known. (f) There is no stoppage in transportation. (g) The title to the gas remains in the receiver until delivery to the ultimate consumer.

In substance and effect there are continuing orders by the consumers to the receiver through the distributing company to supply them with gas from the Oklahoma fields. Such transactions have the character of interstate commerce at their inception, and this character continues until final delivery."

The sample contract between a distributing company and a consumer (Rec., p. 1072) shows that the consumer makes a contract which is a standing order for natural gas good until three days after the day on which he gives notice to discontinue the supply. Under this contract the consumer agrees to pay for the natural gas, not each time he turns on a cock, as appellants would have the court believe, nor by each thousand cubic feet of natural gas consumed, but from month to month, and if the bill for natural gas at the regular rates does not amount to 50 cents per month, he yet agrees to pay that amount as a readiness-to-serve charge.

The method in which the business is conducted is also stated in the evidence found in paragraphs numbered 61 to 65, inclusive. (Rec., pp. 809-812.) The course of business is graphically illustrated in Exhibit "R" (Rec., p. 1143), attached to the affidavit of Samuel S. Wyer. Mr. Wyer, who has made numerous investigations and examinations of the pipe line system operated by the receiver, was recently appointed under the proclamation of the President of September 16, 1918, "Chief, Natural Gas Conservation Under the Fuel Administration," pursuant to the provisions of the Act of August 10, 1917, known as the Lever Bill.

A condensed statement of Mr. Wyer's evidence in respect to the method of carrying on the business is found at page 810 of the record. It follows:

> "Gas passes from the well tubing, where found, out to the conveying lines, then to the

measuring stations and to the various compressing stations, through the main line measuring stations at the gates of the town, and then through the medium of the pressure lines of the town; then through the low pressure line of the town to the gas service cocks and the gas service lines to the consumers' pipe, and ultimately fixing its final destination at the burner of the consumers' fixtures. It requires all of these pipe lines, those of the Kansas Natural, the distributing company and the consumer to complete the system. All of them are essential to the transmission of gas from Kansas or Oklahoma to the consumers in Missouri. Gas is a fluid composed of a large number of molecules which are vehicles of energy continually in motion, and having an inherent tendency to get farther and farther apart. The range of motion of the molecules is limited only by the volume of the closed containing vessel in which they constantly move to and fro. The most distinguishing characteristic of gas is its universal property of completely filling an enclosed space.

"Natural gas is a highly combustible gas made by a secret process of nature. It is not a chemical compound, but is a mechanical mixture of several gases, the number and proportion of the various constituents varying somewhat with different localities and at individual wells. Gas pressure is the result of the combined efforts of all of the moving molecules in the mass trying to get farther and farther apart. Being restrained in the container it exercises a pressure against the walls of the vessel. The pressure is the same in all directions on equal areas of surface. With a given mass of gas any increase in the volume of the containing vessel will give the mole-

cules more range of motion and thereby lower the pressure. So if part of a given mass of gas is removed from a reservoir the remaining mass of gas will expand instanter and keep the reservoir filled, but at a lower pressure.

In the transportation of natural gas from the gas stand to the ultimate consumer the gas is never at rest, but is a constantly seething, moving mass between the gas stands in the fields and the consumers' fixtures in the various cities.

When the line is operated at its fullest capacity the gas will move at a greater velocity than the fastest express train. The gas can only go in one direction at the same time when flowing through a given pipe. The gas is compressed at compressor stations and is thus forced from the field to the point of consumption. At the intake of the line the pressure must be large and at the discharging end of the line the pressure should be relatively low. There is no delivery until the gas has not only passed through the consumer's meter, but is burned at the consumer's fixtures. Each distributing plant is simply one of the integral transportation system as a whole. There is no delivery beginning at the consumer's pipe line to the service pipe.

In making a comparison between the transportation of railroad and the transportation of natural gas by pipe lines, the receiver of the goods in the railroad shipment corresponds to the ultimate consumer of the natural gas. There is no other feasible way of transporting natural gas except by this system or method of pipe lines. The continuous movement of gas in the pipes is caused by the expansion power of the gas produced orig-

inally by natural rock pressure and as that pressure declines it is supplemented by gas compressors along the main transportation line. In the system of the Kansas Natural Gas Company the movement is always from Oklahoma north through Kansas into Missouri.

The demands on the pipe line vary very largely with the hours of the day. Gas being compressible, if the compressor stations are operated practically uniformly, that is, with a practical uniform rate, then during certain periods of the day when the consumption is less than the output at the compressing station may be made to do what in the natural gas man's parlance is known as 'packing the lines,' which will result in a limited storage capacity in the line. This is inevitably connected with the transportation of gas and if it were not present transportation of gas could not be made with the present size of the Kansas Natural pipe line system.

During such periods of the day as the natural gas flow is below the normal, service gas may be by-passed into a storage holder, and then it may be removed from the holder during the peak-load-demand in order to take care of the peak-load-demand at the distributing plant. This is not necessary so far as the transportation of gas is concerned, but is useful to improve the service rendered by the distributing company. Ordinarily the percentage of gas thus flowing through a holder is relatively small. Such holders are not generally used in the transportation and delivery of natural gas. Such holder is not a part of the transportation of gas, but is a mere incident and is merely a part of the distribution. Storage might be compared to the milling of

> grain in transit, or the feeding of cattle in transit, or the compressing of cotton in transit. It might also be compared to water standing in an irrigation ditch.
>
> The Kansas Natural has a 16-inch main running from Petrolia to Kansas City, 110 miles long. The mean pressure is 250 pounds. The storage capacity of that would be 14,634,620 cubic feet. If there is a delivery of 70 million cubic feet a day from this pipe line it would have to be filled and emptied five times during the day."

It is conceded that the transportation of natural gas through the gathering lines of the receiver in Oklahoma and through the trunk lines in Kansas and Oklahoma is interstate commerce, but appellants contend that it loses its interstate character or becomes interstate commerce of a local nature when it passes from the trunk lines of the receiver to the lines of the distributing companies in each of the forty-five cities in which the natural gas is sold. Judges Sanborn, Booth and Campbell, who granted the preliminary injunction, were unanimous in holding that the receiver was engaged in interstate commerce. Judge Booth, who entered the decrees appealed from, found that the interstate commerce character of the business did not end when the natural gas passed into the lines of the distributing companies, but continued until it reached the burner tips of the consumers. It is therefore pertinent to consider what change happens in the method of carrying on the business in the transfer of the natural gas to the distributing companies that causes it to lose its interstate character.

(1) It is not delivered to the distributing companies, but passes as freely from the trunk lines of the receiver to the lines of the distributing companies as it does from the gathering lines in Oklahoma to the trunk lines.

(2) It is not sold to the distributing companies, but remains the property of the receiver until delivery is made to the consumers. While the price is all paid to the distributing companies, yet it is divided—part going to the receiver and the balance to the distributing company. If the consumer does not pay, there is nothing to divide, and neither the receiver nor the distributing company gets anything. The receiver loses his gas. If there had been a delivery and sale of the gas to the distributing company, the loss would fall upon the distributing company. But as the distributing company pays nothing to the receiver except a percent of what is collected from the consumer, the distributing company never owned the gas at any time and only represents the receiver in the distribution and sale of the natural gas to the consumers. The receiver likewise alone suffers from all leakage up to the consumer's meter.

(3) Whether the distributing company is the agent of the receiver or a connecting carrier transporting the receiver's gas through its distributing system is immaterial. It performs a service in the transportation of the natural gas, and while it never owns or has title to the natural gas, yet it receives its pay for what it does, out of what the consumer pays for it. Its position is very much like that of the real estate agent who gets a commission based on the amount involved. Out of the

commission he maintains his office, advertises the land for sale, and perhaps collects the money. If there is any loss in the transaction, if the land is not sold for its full value, the loss falls on the owner. So here any loss from bad accounts and from leakage falls on the receiver. He buys or produces the gas in Oklahoma. He pays for it as measured by meter in that state. Title passes to him. No other sale is made until the gas reaches the consumer, who pays for the gas on the basis of his meter readings. If the distributing company bought the gas and paid for it at the connection with the receiver's mains, the amount to be received by the receiver would be measured by the meters at the connection at the city limits. Such, however, is not the fact in this case. The only sale is to the consumer, and out of what is obtained from him the receiver obtains pay for what the natural gas cost him, the cost of transportation in the trunk lines, and his profit, and the distributing company gets pay for transporting the natural gas from the trunk lines to the consumer, the cost of collection and its profit.

(4) The movement of the natural gas from the well to the consumer's burner tips is continuous and uninterrupted by any stoppage or periods of rest or storage. Whatever storage exists in the distributing company's lines is incidental and part of the transportation.

(a) Incidental stoppage or storage.

The affidavit of Mr. Wyer (Rec., p. 812) shows that at certain periods of the day when the consumption is less than the output "there is a pack-

ing of the lines which results in a limited storage capacity in the line," also in a few of the cities there are holders where a part of the gas is stored for future delivery. Mr. Wyer states, however, that the packing of the lines is but an incident to the transportation and the use of the holder is a mere incident and a part of the distribution. He also says (Rec., p. 812) that there is a 16-inch main running to Kansas City 110 miles long, and that if there is a delivery of 70 million cubic feet per day from this line it would have to be filled and emptied five (5) times during the day.

Exhibit "R" to Mr. Wyer's affidavit (Rec., p. 1142) also shows that the movement of the gas is accelerated shortly after it leaves the well by use of compressors, while its movement is made slower shortly before it reaches the service line of the consumer by the use of low pressure regulators. Mr. Wyer also states that when the line is operated at its fullest capacity the gas will move at a greater velocity than the fastest express train.

Mr. Hurlburt, engineer for the Kansas City Gas Company, appellant, testified (Rec., p. 810) that the carrying capacity and the storage capacity are requisite and necessary for the proper supply of gas and that if it were not for the storage capacity the receiver would not be able to supply the instantaneous demands of consumers; that all gas is in constant motion, and even if enclosed in a holder it cannot be held still; that there is a constant movement of gas in the pipe lines, the general direction of which is from the gas sands of the wells toward the consumers' appliances.

This Court has recognized that in the transportation of products there must and will necessarily be incidental stoppages and storage. Such stoppages and storages have never destroyed the interstate character of the movement.

In *Kelley* v. *Rhoads*, 188 U. S. 1, the sheep grazed along the road through Wyoming to Nebraska; in *Swift & Company* v. *United States*, 196 U. S. 375, the cattle were held for a time in the stock yards; in *S. P. Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, the cotton seed cake was stopped at Galveston in order that it might be transformed into meal; in *T. & N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, the lumber was transferred from the cars to the docks in order that it might be loaded on ships; in *Railroad Commission of Louisiana* v. *T. & P. Ry. Co.*, 229 U. S. 336, the staves and logs were transshipped from the railroad cars to ships at New Orleans; in *A. T. & S. F. R. Co.* v. *Harold*, 241 U. S. 371, the grain was taken from the defective car and placed in another car to be forwarded from Topeka to Elk Falls; in *Railroad Commission* v. *Worthington*, 225 U. S. 101, the coal was moved by railroad to Huron, Ohio, where it was stored in large quantities and later put upon vessels and shipped out of the state; in *Cleveland C. C. & St. L. R. Co.* v. *Dettlebach*, 239 U. S. 588, the goods were placed in the freight house in September, after the transportation by rail was ended, and not called for until November; in *Western Transit Co.* v. *Leslie & Co.*, 242 U. S. 448, the goods had free storage at Buffalo for a period to await further orders before forwarding to New

York; in *So. Pac. R. Co.* v. *Prescott,* 240 U. S. 632, the entire freight charges were paid and four boxes were taken away by the consignee, nine boxes remained to meet the convenience of the consignee in removal; in *Western Oil Refining Co.* v. *Lipscomb,* 244 U. S. 346, the oil was shipped in tank cars and barrels accompanied it to Columbia, Tennessee, part of the oil was disposed of and the remainder with the barrels shipped to Mount Pleasant; in the Ticker Cases, 38 S. Ct. 438, the information was transmitted over the telegraph lines to Boston where it was translated from the Morse code into English and thus transmitted to the offices of the customers; in *Mo. Kan. & Tex. Ry. Co.* v. *Texas,* 245 U. S. 484, the train was stopped in order to change engines and crews. In each and all of the above cases there was more incidental stoppage and storage than in this case, and yet those stoppages and storage did not affect or destroy the interstate character of the movement.

(b) Fallacy of appellants' commingling theory.

Kansas Defendants' Brief, p. 36.—The fallacy of the commingling theory advanced by defendants is apparent when it is remembered that the question of whether or not the goods previously transported in interstate have been commingled with the mass of property in the state is but one criterion by which to determine whether the goods have come to rest and the interstate journey has ended. It is not the sole rule for determination, nor does the mixing of interstate shipments with intrastate shipments destroy the pro-

tection given to the interstate so long as the movement originally intended continues. The intent to commingle at arrival is not of any moment because every shipper must know that ultimately the shipment will be commingled with the mass of property within the state. It is the cessation of the journey and delivery of the shipment that terminates the interstate character of the transaction. Mere mixing the interstate with the intrastate shipment does not destroy the interstate character of the transaction so long as the end intended at the commencement of the interstate journey has not been reached. It is admitted by all parties that the movement of the natural gas from Oklahoma to the Kansas state line is interstate in its character, for this Court has so determined the matter in *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229.

As was said in *Illinois Central R. Co.* v. *Louisiana R. R. Commission*, 236 U. S. 157, 163, 35 S. Ct. 275, 59 L. Ed. 517:

> "When freight actually starts in the course of transportation from one state to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end."

The record shows clearly that the Receiver initiates the interstate journey in Oklahoma with

the intention that the natural gas shall move to the burner tips of the consumers in Kansas and Oklahoma, for he receives his pay only for such gas as is actually delivered and used by the consumers.

The contention of the Kansas defendants in respect to the commingling before the termination of the interstate trip is refuted by the decisions of this Court in the Worthington case, 225 U. S. 101, 32 S. Ct. 653. There the coal was shipped from the mines to the docks without knowing the ultimate destination, the specific consignee, and with interstate and intrastate mixed indiscriminately. Part of the coal was ultimately and regularly consumed within the state of Ohio, thus making part of the shipment entirely intrastate. All coal forwarded in coal cars was dumped in big heaps at the docks, where it sometimes remained for weeks. From these big heaps part was taken for intrastate shipment and part for the continuation of the interstate journey. The admixture of the intrastate with the interstate, the lack of knowledge of the specific consignee for any of the coal, the unknown destination, and the intent at the time of the commencement of the trip that interstate and intrastate shipments should be mixed beyond separation in the course of the transportation did not give to the Railroad Commission of Ohio, even though Congress had not assumed control over the commerce there involved, power to prescribe rates for the interstate commerce involved. This commingling theory of the defendants was also answered in the case of *S. P. T. Co. v. Interstate Commerce Commission,* 219

U. S. 498, 31 S. Ct. 279. In *Swift & Company* v. *United States*, 196 U. S. 375, 25 S. Ct. 276, 49 L. Ed. 518, the same indiscriminate mixing of interstate and intrastate shipments is found. The ultimate consignee and destination of both interstate and intrastate shipments were alike unknown. The part of the articles intended for interstate commerce could not until the end be distinguished from the intrastate. The statement found in the Minnesota Rate Cases, 230 U. S. 352, is conclusive, namely:

> "The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations."

And Congress has declared by its inaction in this case that the subject of fixing rates for natural gas must be left free from control of the states. Congress's declaration in this respect is controlling, even though interstate and intrastate shipments be mixed. When there is a conflict between the power of Congress over interstate commerce and that of the state over intrastate commerce, the power of the state must yield to that of Congress. Otherwise every shipment of grain from Kansas to Missouri, at the option of the shipper, would be governed by the intrastate rates, for the shipper at the proper moment would mix a handful of grain grown within the state of

Missouri into the car of Kansas grain and thus commingled the shipment in Missouri would become intrastate, and the through interstate rate and the authority of the Interstate Commerce Commission would be defeated. Thus stated, the absurdity of the contention of the Public Utilities Commission is apparent. A holding as that sought by the Commission in this case would result in endless confusion, permit the shipper to determine what rates should govern by the expediency of mixing with the interstate some intrastate shipment, however small in comparison with the interstate shipment, and avoid any distasteful rulings of any regulatory body. We say "however small" for the reason that here the intrastate gas consumed in Kansas is less than 6 per cent of all the gas transported and sold by the Receiver.

No gas produced or manufactured in Missouri is mixed with the gas transported by the Receiver and delivered to consumers in Missouri. There is a statement in the brief of the Wyandotte County Gas Company and Kansas City Gas Company (p. 34) to the effect that gas manufactured in St. Joseph, Mo., is mixed with the natural gas sold consumers in that city, but the Receiver is not now nor for some time past has he transported any gas to St. Joseph. Some time ago the pipe lines under the Missouri River were washed out, and they have never been rebuilt.

(c) No change of title.

Kansas Defendants' Brief, p. 58—This statement is made: "The title does not remain in the

name of the transporter, but is owned as much by the distributing company as the importer after the passage of the gas into the distributing company's lines at the ratio," etc. Also we find the following: "The two elements of the transaction —transportation and distribution—seem to be elements of partnership," etc.

We direct the Court's attention to the statement of facts in the same brief (pp. 5 and 6), wherein it is stated that the statement made by the Supreme Court of Kansas as to how the business is transacted was adopted by the District Court and *all parties* as a fair statement. The following from the statement of the Supreme Court, accepted and quoted by the Kansas defendants, refutes the contention as to joint ownership and partnership:

> *"These distributing companies act as agents for the Kansas Natural Gas Company in the distribution and sale of gas.* The price received for gas is divided between the distributing companies and the receivers on a percentage basis. *The gas is not sold by the receivers to the distributing companies.* It is delivered from the pipe lines of the Kansas Natural Gas Company, under the control of the receivers, into the pipe lines of the distributing companies, and is through these pipe lines conveyed from the pipe lines of the Kansas Natural Gas Company to the consumers."

If the natural gas was owned by the distributing companies in whole or in part, or if the distributing companies were not the agents of the receiver in distributing the gas, the Public Utili-

ties Commission was not entitled to make the order it did, because most of the distributing companies are limited in their business to one city, and under Section 3, Chapter 238, Session Laws of Kansas, 1911, the Public Utilities Commission has no jurisdiction over such utilities. (Kansas defendants' brief, p. 158.)

There is no element of partnership because the gas is purchased or produced in Oklahoma by the Receiver, out of his own funds, the losses from leakage and bad bills are borne entirely by him, he stands his own expenses and the distributing companies their own. The Receiver does not account to the distributing company for any part of his net profits, and the distributing company does not share with the Receiver any part of its net profits. There is no partnership. As the court below found, and as the Supreme Court of Kansas held, the title to the natural gas remains in the Receiver until it is delivered to the consumers.

At several points in the briefs of the various appellants we find the contention made that the gas is forwarded to the distributing companies by the Receiver to be held for sale to whomsoever shall pay for it, in such quantities and at such times as the party shall apply to the local agent who holds the same for sale. Such a position is untenable. Judge Booth found that in substance and effect there are continuing orders by the consumers to the Receiver through the distributing company to supply them with gas from the Oklahoma fields. (Rec., p. 593.) The sample contract between a distributing company and a consumer (Rec., p. 1072) establishes that the

consumer makes an agreement which is a standing order for natural gas good until three days after the day on which he gives notice to discontinue the supply. He is required to pay each month for the gas delivered to him, and if he has not purchased gas sufficient to equal 50 cents in value under the regular rates he must pay such amount as a readiness-to-serve charge.

If each time the consumer used gas it amounted to a separate sale and delivery, the distributing company would be obliged to send a man out to the service cock in front of the consumer's house and turn the gas on and off each time the use was made, and collection would be made on the amount used at such time. This is not the case. The amount used each time is not separated. Those only can use gas who have their pipe lines connected with the distributing system and who have entered a standing order for gas to continue until three days after the order to discontinue the supply is given. No others can obtain it. Just as in the Ticker cases, 38 S. Ct. 438, the customers are solicited by the local companies, the service lines are connected with the distributing company, the service is there ready to be used when the customer wants it, for which he pays by the month. Each time the customer uses the service he does not pay a separate and distinct charge. He waits until the end of the month and pays the sum total. In that case, such a manner of doing business did not destroy the interstate character of the business, and it does not do so here. Here, as there, the normal, contemplated and followed course of trans-

portation is as continuous and rapid as science can make it from the gas wells in Oklahoma to the consumers in Kansas and Missouri. Such is the testimony of Mr. Wyer and of the witnesses for the appellants. (Rec., pp. 810-812.) Such is the finding of the lower court. (Rec., pp. 593, 617.)

(d) Cases cited by appellants not applicable.

Of the cases cited on interstate commerce by the various appellants, we shall point to only a few in order to show that the line of authorities relied upon by them is not applicable. All cases cited by them involve indirect burdens and regulation of interstate commerce. This is true of the taxation cases mentioned. A state may tax goods from another state come to rest therein, the same as other property in the state, even though the protection from direct regulation under the commerce clause has not been ended. This proposition is clearly explained in *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, where this Court said (l. c. 519):

> "Assuming that the goods concerning which the state taxes in this case were levied were in the original packages and had not been sold, if the bringing of the goods into Tennessee from another state constituted an importation, in the constitutional signification of that word, it is clear they could not be directly or indirectly taxed. But the goods not having been brought from abroad, they are not imported in the legal sense and were subject to state taxation after they had reached

their destination and whilst held in the state for sale. This is conclusively foreclosed by the decisions of this Court as is the doctrine resting upon the decision in *Brown* v. *Maryland*. *Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Houston*, 114 U. S. 622. The doctrine upon which the cases rest was this: that imports, in the constitutional sense, embrace only goods brought from a foreign country, and consequently do not include merchandise shipped from one state to another. The several states, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the states had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the state."

Continuing, Mr. Justice White said (l. c. 521):

"Thus, in *Brown* v. *Maryland* there was an absolute want of power to tax imports, and it was held that the state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such. *Woodruff* v. *Parham* and *Brown* v. *Houston*, on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether the particular exertion of that power by the state so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce

terminated, the criterion announced in *Brown* v. *Maryland*, that is, a sale in the original package at the point of destination, was applied. The court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce. In *Leisy* v. *Hardin* and *Lyng* v. *Michigan* the same question in a different aspect was presented. The goods had reached their destination and the question was not the power of the state to tax them, but its authority to treat the goods as not the subjects of interstate commerce and to prohibit their introduction or sale. This was held to be a regulation within the constitutional sense and therefore void. The cases, therefore, did not decide that interstate commerce was to be considered as having completely terminated at one time for the purposes of import taxation, and at a different period for the purpose of interstate commerce. But both cases, whilst conceding that interstate commerce was completely terminated only after the sale at the point of destination in the original packages, were rested upon the nature and operation of the particular exertion of state authority considered in the respective cases."

Thus it appears that the sustaining of the power of a state to tax goods transported in interstate commerce, without discrimination, like other goods in the state, does not amount to a holding that the interstate character of the transaction has been lost, but only that the goods have come to rest within the state. In other words, the exertion of the general taxing powers of a state, without discrimination, is but a remote and indirect burden upon interstate commerce.

The same distinction between the power of the state to indirectly affect interstate commerce by taxation, but not directly to burden it by regulation or prohibition, is found in *American Express Co.* v. *Iowa*, 196 U. S. 133, l. c. 146.

General Oil Co. v. *Crain*, 209 U. S. 211, cited and relied upon by appellants, involved the same question as that in *American Steel & Wire Co.* v. *Speed, supra*, and the decision is based entirely on that case.

Brown v. *Houston*, 114 U. S. 622, is distinguished in the quotation we have made from *American Steel & Wire Co.* v. *Speed, supra.*

The case of *Banker Bros.* v. *Pennsylvania*, 222 U. S. 210, strongly urged by some of the appellants as decisive, likewise involved solely the right of the state to exercise its general taxing powers. Nothing said in that case can be taken as modifying the analysis of the cases set forth in *American Steel & Wire Co.* v. *Speed, supra*, for the latter case is the authority on which the former is decided.

Browning v. *City of Waycross*, 233 U. S. 16, was also a taxing case. The following statement

from the opinion therein shows it is no exception to the rule:

> "The general principles by which it has been so frequently determined that a state may not burden by taxation or otherwise the taking of an order in one state for goods to be shipped from another or the shipment of such goods in the channels of interstate commerce up to and including the consummation by delivery of the goods at the point of shipment have been so often stated as to cause them to be elementary and as to now require nothing but the mere outline of the principle."

Of the cases cited by the appellants, the Wyandotte County Gas Company and the Kansas City Gas Company, on the question of interstate commerce, we direct the Court's attention to the fact that they do not involve interstate commerce or else they concern only the power of the state to indirectly burden it. The contention advanced by the same appellants that a public utility selling the article it transports is not entitled to the protection of the commerce clause of the Federal Constitution is too absurd to entitle it to serious consideration. In the Ticker cases, *supra,* the telegraph companies were not acting as common carriers, were selling the product they transported, and yet the protection of the commerce clause of the Constitution was accorded them.

That the fixing of rates for interstate transportation or the fixing of prices at which articles transported in such commerce shall be sold is a

direct burden upon such commerce and beyond the power of the state is too well decided to require any lengthy citation of authority. We do not mean to say that the states cannot prescribe reasonable rules and regulations as to the manner of handling gas which concern the question of safety, but they cannot directly burden it by prescribing the rates for gas transported in interstate commerce.

But all controversies as to who owns the natural gas after it reaches the pipe lines of the distributing company or when it is delivered to the consumer is immaterial in determining the question as to whether it moves in interstate commerce until it reaches the burner tips of the consumer.

The ownership of the property may change in transit as it did in the Harold case (241 U. S. 371); there may be a change of carriers as in that case; the distributing company may purchase the gas outright from the receiver, and own it all when it is delivered to the consumer, and yet if, when it was started on its journey in Oklahoma, it was the purpose to deliver it to consumers in Kansas and Missouri, and that purpose is carried out, it moves in intercommerce until it reaches the burner tips of the consumers, notwithstanding the change of ownership and of carriers.

(e) The fixing of the price at which gas is sold to consumers is the fixing of the rate for transportation and a direct interference with and an undue burden on interstate commerce conducted by the receiver.

The price at which natural gas is sold includes the cost of production, transportation, and distri-

bution, and profit, if any. Natural gas in Oklahoma costs the plaintiff about 7 cents per thousand cubic feet. If it is sold for 28 cents in Topeka and the distributing company gets one-third of the amount received from the consumer for distribution, then the plaintiff would receive 18 2/3 cents for gas for which he paid 7 cents. Eleven and two-thirds cents would be left to pay transportation and profit. It thus appears that the cost of transportation is an important factor, and when the state attempts to fix the price at which gas can be sold it, in effect, fixes the cost of transportation in interstate commerce, and this is a regulation of interstate commerce. (See statement of Judge Booth on this subject, Rec., p. 599.) Every obstacle or burden laid upon interstate commerce by legislative authority is regulation. State Freight Tax cases, 15 Wall. 232, 82 U. S. 232, 21 L. Ed. 146.

The attempt to fix any price being a regulation, it is beyond the power of the state to do this on natural gas produced or purchased in Oklahoma and sold in Kansas.

In *Missouri, Kansas & Texas R. Co.* v. *Texas*, 245 U. S. 484, the first syllabus is:

> "Where, in regular course, a passenger train is moved by one company from one state to a point in another, and is there taken charge of and carried to destination by a second company, local to the second state, it is manifestly erroneous to hold that its interstate character is lost because the second company employs new crews and engines and cannot go beyond the state line."

In the course of the opinion this language is used:

> "Again, the question is not what the State Commission might require of a road deriving its powers from the state, with regard to local business (*Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262, 283), but whether the order if applied to this case would not unlawfully interfere with commerce among the states.
>
> On its face the order as applied was an interference with such commerce."

The order was declared to be void and beyond the power of the state. So here the state has no power to directly burden the interstate commerce conducted by the receiver, though the gas after reaching the city limits of the various cities is taken charge of and carried to destination by the distributing companies local to their respective states.

In the case of *L. & N. R. Co.* v. *Eubank,* 184 U. S. 27, 46 L. Ed. 416, 22 Sup. Ct. Rep. 277, a section of the Kentucky Constitution which had been held constitutional in the case of *L. & N. R. Co.* v. *Kentucky,* 183 U. S. 503, 22 Sup. Ct. Rep. 95, when applied to intrastate commerce, was held unconstitutional when applied to interstate commerce for the reason that the state has no jurisdiction over interstate transportation, and that an attempt to regulate such rates by the state or under its authority is void.

This case was cited with approval in *Railroad Commission* v. *Worthington,* 225 U. S. 101, 32

Sup. Ct. Rep. 653. In this case the court decided that coal originating in Ohio and shipped to the ports of Huron and Cleveland, Ohio, for carriage by defendants on Lake Erie to points in other states, was being transported in interstate commerce. There was a small quantity of the coal that was unloaded in the Ohio islands in Lake Erie. Although there is a small quantity of the gas both produced and sold in Kansas, yet it cannot affect the great bulk of the gas that is produced in Oklahoma and sold in Kansas. In the Worthington case the Supreme Court did not endeavor to ascertain whether the rate fixed by the Railroad Commission of Ohio was too low, but after determining that the coal was being transported in interstate commerce held that the act of the Ohio Commission in fixing the rate was void. The court said:

> "We therefore reach the conclusion that under the facts shown in this case the Railroad Commission in fixing the rate of 70 cents for the transportation above described attempted to directly regulate and control interstate commerce, and for that reason the enforcement of its order should be enjoined."

To the same effect are *Wabash, St. L. & P. R. Co.* v. *Illinois,* 118 U. S. 557; *Covington & C. Bridge Co.* v. *Kentucky,* 154 U. S. 204, and *Hanley* v. *K. C. S. Ry. Co.,* 187 U. S. 17.

(f) Other contentions of appellants answered.

Concerning the remaining proposition relative to interstate commerce set out in the Kansas de-

fendants' brief at page 59, that the gas business carried on under a local franchise originally intended to apply wholly to local gas estops the importer from claiming immunity from local control, we condense our answer into the following propositions:

(1) Jurisdiction over interstate commerce cannot be conferred upon the Public Utilities Commission by consent of parties.

(2) The Kansas Natural Gas Company, in applying for admission to do business in the state of Kansas, consented only to the regulation of its intrastate business by the state. And though its business at the time of the application was entirely intrastate, it was not thereby estopped to afterwards engage in interstate commerce nor could the state impose such a limitation on the exercise of its corporate functions. *West* v. *Kansas Natural Gas Company,* 221 U. S. 229.

(3) The state cannot impose as a condition upon the doing of domestic business within the state, the right to burden the interstate business of the corporation. This was established in *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, where the counsel for the Kansas defendants presented the same argument he now urges in this case, and which was by this Court overruled.

(4) The use of local franchises, the use of the streets and alleys, does not give to the state the power to regulate directly interstate commerce. The Ticker cases, 38 S. Ct. 438.

(5) Whatever agreement the Kansas Natural Gas Company may have made with the state of Kansas was personal to that company, did not

run with the title or possession of its property and is not binding on the receiver, or a purchaser of the property at foreclosure sale.

As to the contention of the same defendants found on the same page (59), that the imported gas is still mingled with local gas, constituting a substantial part of the whole, we reiterate that less than 6 per cent of the gas sold by the receiver in Kansas is produced within that state. (Rec., p. 597.) More than 94 per cent of the gas delivered to consumers in Kansas comes from Oklahoma. None of the gas delivered to consumers in Missouri is produced within that state. The figures speak for themselves.

As to the local character of the interstate commerce conducted by the receiver, we again invite the attention of the Court to the statement of Judge Booth (Rec., p. 596) that the state of Kansas has recognized the subject is one which requires uniformity of regulation which cannot be given it by the states. It would indeed be a strange anomaly that the transportation of natural gas from the wells in Oklahoma to the state line should constitute interstate commerce of a national character free from direct regulation by the state, but when it passes into Kansas it immediately becomes local in its nature and subject to direct regulation, by the states. We do not believe this Court will depart from its decision in *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, but will reach the same conclusion here as there, that the commerce conducted by the receiver is interstate in its character and free from state control.

No assignment of error on account of confiscatory rate made by Kansas City Gas Company, Wyandotte County Gas Company, Kansas City Pipe Line Company or Fidelity Trust Company.

We have sought in vain to find any assignment of error by the Kansas City Gas Company, the Wyandotte County Gas Company, Kansas City Pipe Line Company or the Fidelity Trust Company to the effect that the court below erred in holding that the 28-cent rate is unreasonable, non-compensatory and confiscatory. If we are mistaken we should be glad to have counsel on the other side point out this specific assignment which covers such error.

Respectfully submitted,

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